CONTINUATION OF THE NOMINATION OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JULY 15, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:31 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

Chairman LEAHY. Good morning, everyone. Judge, it is good to see you back, and your family.

Judge Sotomayor, yesterday you answered questions from 11 Senators. Frankly, I feel you demonstrated your commitment to the fair and impartial application of law. You certainly demonstrated your composure and patience and your extensive legal knowledge.

Today we will have questioning from the remaining eight members of the Committee, and then just to set the schedule, once we finish that questioning, we will arrange a time to go into the traditional—something that we do every time for the Supreme Court nominee—closed-door session, which is usually not very lengthy, and then go back to others. I have talked with Senator Sessions. We will then go to a second round of questions of no more than 20 minutes each. I have talked with a number of Senators who have told me they will not use anywhere near that 20 minutes, although every Senator has the right to do it. Then I would hope we might be able to wrap it up.

But we are going to go to Senator Cornyn, himself a former member of the Texas Supreme Court and former Attorney General. And, Senator Cornyn, it is yours.

Senator CORNYN. Thank you, Mr. Chairman. Good morning, Judge.

STATEMENT OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge SOTOMAYOR. Good morning, Senator. It's good to see you again.

Senator CORNYN. Good to see you. I recall when we met in my office, you told me how much you enjoy the back-and-forth that lawyers and judges do, and I appreciate the good humor and attitude that you brought to this. And I very much appreciate your willingness to serve on the highest Court in the land. I am afraid that sometimes in the past these hearings have gotten so downright nasty and contentious that some people are dissuaded from willingness to serve, which I think is a great tragedy. And, of course, some have been filibustered. They have been denied the opportunity to have an up-or-down vote on the Senate floor.

I told you when we visited in my office, that is not going to happen to you, if I have anything to say about it. You will get that up-or-down vote on the Senate floor.

But I want to ask your assistance this morning to try to help us reconcile two pictures that I think have emerged during the course of this hearing. One is, of course, as Senator Schumer and others have talked about, your lengthy tenure on the Federal bench as a trial judge and court of appeals judge. And then there is the other picture that has emerged from your speeches and your other writings, and I need your help trying to reconcile those two pictures, because I think a lot of people have wondered about that.

The reason why it is even more important that we understand how you reconcile some of your other writings with your judicial experience and tenure is the fact that, of course, now you will not be a lower-court judge subject to the appeals to the Supreme Court. You will be free as a United States Supreme Court Justice to basically do what you want with no court reviewing those decisions, harkening back to the quote we started with during my opening statement about the Supreme Court being infallible only because it is final.

So I want to just start with the comments that you made about the wise Latina speech that, by my count, you made at least five times between 1994 and 2003. You indicated that this was really—and please correct me if I am wrong, I am trying to quote your words—"a failed rhetorical flourish that fell flat." I believe at another time you said they were "words that don't make sense." And another time I believe you said it was "a bad idea."

Am I accurately characterizing your thoughts about the use of that phrase that has been talked about so much?

Judge SOTOMAYOR. Yes, generally, but the point I was making was that Justice O'Connor's words, the ones that I was using as a platform to make my point about the value of experience generally in the legal system, was that her words literally and mine literally made no sense, at least not in the context of what judges do or—what judges do.

I didn't and don't believe that Justice O'Connor intended to suggest that when two judges disagree, one of them has to be unwise. And if you read her literal words that wise old men and wise old women would come to the same decisions in cases, that's what the words would mean. But that's clearly not what she meant. And if you listen to my words, it would have the same suggestion, that only Latinos would come to wiser decisions. But that wouldn't make sense in the context of my speech either, because I pointed out in the speech that eight, nine white men had decided *Brown*

v. *Board of Education*. And I noted in a separate paragraph of the speech that no one person speaks in the voice of any group.

So my rhetorical flourish, just like hers, can't be read literally. It had a different meaning in the context of the entire speech.

Senator CORNYN. But, Judge, she said that a wise man and a wise woman would reach the same conclusion. You said that a wise Latina woman would reach a better conclusion than a male counterpart.

What I am confused about is, are you standing by that statement? Or are you saying that it was a bad idea and are you disavowing that statement?

Judge SOTOMAYOR. It is clear from the attention that my words have gotten and the manner in which it has been understood by some people that my words failed. They didn't work. The message that the entire speech attempted to deliver, however, remains the message that I think Justice O'Connor meant, the message that prior nominees including Justice Alito meant when he said that his Italian ancestry he considers when he's hearing discrimination cases. I don't think he meant, I don't think Justice O'Connor meant that personal experiences compel results in any way. I think life experiences generally, whether it's that I'm a Latina or was a State prosecutor or have been a commercial litigator or been a trial judge and an appellate judge, that the mixture of all of those things, the amalgam of them, helped me to listen and understand. But all of us understand, because that's the kind of judges we have proven ourselves to be, we rely on the law to command the results in the case.

So when one talks about life experiences and even in the context of my speech, my message was different than I understand my words have been understood by some.

Senator CORNYN. So do you stand by your words of yesterday when you said it was "a failed rhetorical flourish that fell flat," that they are "words that don't make sense," and that they are "a bad idea"?

Judge SOTOMAYOR. I stand by the words. It fell flat. And I understand that some people have understood them in a way that I never intended and I would hope that in the context of the speech that they would be understood.

Senator CORNYN. You spoke about the law students to whom these comments were frequently directed and your desire to inspire them. If, in fact, the message that they heard was that the quality of justice depends on the sex, race, or ethnicity of the judge, is that an understanding that you would regret?

Judge SOTOMAYOR. I would regret that because for me the work I do with students—and it's just not in the context of those six speeches. As you know, I give dozens more speeches to students all the time, and to lawyers of all backgrounds, and I give—and have spoken to community groups of all types. And what I do in each of those situations is to encourage both students and, as I did when I spoke to new immigrants that I was admitting as students, to try to encourage them to participate on all levels of our society. I tell people that that's one of the great things about America, that we can do so many different things and participate so fully in all of the opportunities America presents. And so the message that I de-

liver repeatedly as the context of all of my speeches is: I have made it. So can you. Work hard at it. Pay attention to what you're doing and participate.

Senator CORNYN. Let me ask about another speech you gave in 1996 that was published in the Suffolk University Law Review where you wrote what appears to be an endorsement of the idea that judges should change the law. You wrote, "Change, sometimes radical change, can and does occur in the legal system that serves a society whose social policy itself changes." You noted with apparent approval that, "A given judge or judges may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction."

Can you explain what you meant by those words?

Judge SOTOMAYOR. The title of that speech was "Returning Majesty to the Law." As I hope I communicated in my opening remarks, I'm passionate about the practice of law and judging, passionate in the sense of respecting the rule of law so much, the speech was given in the context of talking to young lawyers and saying, "Don't participate in the cynicism that people express about our legal system." I——

Senator CORNYN. What kind of—excuse me. I am sorry. I didn't mean to interrupt you.

Judge SOTOMAYOR. And I was encouraging them not to fall into the trap of calling decisions that the public disagrees with, as they sometimes do, "activism" or using other labels; but to try to be more engaged in explaining the law and the process of law to the public. And in the context of the words that you quoted to me, I pointed out to them explicitly about evolving social changes, that what I was referring to is Congress is passing new laws all the time, and so whatever was viewed as settled law previously will often get changed because Congress has changed something.

I also spoke about the fact that society evolves in terms of technology and other developments, and so the law is being applied to a new set of facts.

In terms of talking about different approaches in law, I was talking about the fact that there are some cases that are viewed as radical, and I think I mentioned just one case, *Brown* v. *Board of Education*, and explaining and encouraging them to explain that process, too. And there are new directions in the law in terms of the Court. The Court, the Supreme Court, is often looking at its precedents and considering whether in certain circumstances—because precedent is owed deference for very important reasons. But the Court takes a new direction, and those new directions rarely, if ever, come at the initiation of the Court. They come because lawyers are encouraging the Court to look at a situation in a new way, to consider it in a different way.

What I was telling those young lawyers is, "Don't play into people's skepticism about the law. Look to explain to them the process."

I also, when I was talking about returning majesty to the law, I spoke to them about what judges can do, and I talked about, in the second half of that speech, that we had an obligation to ensure that we were monitoring the behavior of lawyers before us so that when questionable ethical or other conduct could bring disrepute to

the legal system, that we monitor our lawyers, because that would return a sense——

Senator CORNYN. Judge, if you would let me—I think we are straying away from the question I had talking about oversight of lawyers. Would you explain how, when you say judges should—I am sorry. Let me just ask. Do you believe that judges ever change the law? I take it from your statement that you do.

Judge SOTOMAYOR. They change—we can't change law. We're not lawmakers. But we change our view of how to interpret certain laws based on new facts, new developments of doctrinal theory, considerations of whether—what the reliance of society may be in an old rule. We think about whether a rule of law has proven workable. We look at how often the Court has affirmed a prior understanding of how to approach an issue. But in those senses, there's changes by judges in the popular perception that we're changing the law.

Senator CORNYN. In another speech in 1996, you celebrated the uncertainty of the law. You wrote that the law is always in a, and I quote, "necessary state of flux." You wrote that the law judges declare is not "a definitive, capital 'L' law that many would like to think exists," and "that the public fails to appreciate the importance of indefiniteness in the law."

Can you explain those statements? And why do you think indefiniteness is so important to the law?

Judge SOTOMAYOR. It's not that it's important to the law as much as it is that it's what legal cases are about. People bring cases to courts because they believe that precedents don't clearly answer the fact situation that they are presenting in their individual case. That creates uncertainty. That's why people bring cases. And they say, Look, the law says this, but I'm entitled to that. I have this set of facts that entitle me to relief under the law.

It's the entire process of law. If law was always clear, we wouldn't have judges. It's because there is indefiniteness not in what the law is, but its application to new facts that people sometimes feel it's unpredictable. That speech, as others I've given, is an attempt to encourage judges to explain to the public more of the process.

The role of judges is to ensure that they are applying the law to those new facts, that they're interpreting that law with Congress' intent, being informed by what precedents say about the law and Congress' intent and applying it to the new facts.

But that's what the role of the courts is, and obviously, the public is going to become impatient with that if they don't understand that process. And I'm encouraging lawyers to do more work in explaining the system, in explaining what we are doing as courts.

Senator CORNYN. In a 2001 speech at Berkeley, you wrote, "Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging."

A difference is physiological if it relates to the mechanical, physical or biochemical functions of the body, as I understand the word. What do you mean by that?

Judge SOTOMAYOR. I was talking just about that. There are in the law—there have been upheld in certain situations that certain job positions have a requirement for a certain amount of strength or other characteristics that maybe a person who fits that characteristic can have that job. But there are differences that may affect a particular type of work. We do that all the time. You need to——

Senator CORNYN. We are talking about judging, though, aren't——

Judge SOTOMAYOR [continuing]. Be a pilot who has good eyesight.

Senator CORNYN. We are not talking about pilots. We are talking about judging, right?

Judge SOTOMAYOR. No, no, no, no. What I was talking about there, because the context of that was talking about the difference in the process of judging, and the process of judging for me is what life experiences bring to the process. It helps you listen and understand. It doesn't change what the law is or what the law commands.

A life experience as a prosecutor may help me listen and understand an argument in a criminal case. It may have no relevancy to what happens in an antitrust suit. It's just a question of the process of judging. It improves both the public's confidence that there are judges from a variety of different backgrounds on the bench, because they feel that all issues will be more—better at least addressed—not that it's better addressed, but that it helps that process of feeling confidence that all arguments are going to be listened to and understood.

Senator CORNYN. So you stand by the comment or the statement that inherent physiological differences will make a difference in judging?

Judge SOTOMAYOR. I'm not sure—I'm not sure exactly where that would play out, but I was asking a hypothetical question in that paragraph. I was saying, look we just don't know. If you read the entire part of that speech, what I was saying is let's ask the question. That's what all of these studies are doing. Ask the question if there's a difference. Ignoring things and saying, you know, it doesn't happen isn't an answer to a situation. It's consider it. Consider it as a possibility and think about it. But I certainly wasn't intending to suggest that there would be a difference that affected the outcome. I talked about there being a possibility that it could affect the process of judging.

Senator CORNYN. As you can tell, I am struggling a little bit to understand how your statement about physiological differences could affect the outcome or affect judging and your stated commitment to fidelity to the law as being your sole standard and how any litigant can know where that will end.

Let me ask you on another topic, there was a Washington Post story on May 29, 2009, that starts out saying, "The White House scrambled yesterday to assuage worries from liberal groups about Judge Sonia Sotomayor's scant record on abortion rights." And it goes on to say, "The White House Press Secretary said the President did not ask Sotomayor specifically about abortion rights during their interview."

Is that correct?

Judge SOTOMAYOR. Yes. It is absolutely correct. I was asked no question by anyone, including the President, about my views on any specific legal issue.

Senator CORNYN. Do you know then on what basis, if that is the case—and I accept your statement—on what basis the White House officials would subsequently send a message that abortion rights groups do not need to worry about how you might rule in a challenge to *Roe* v. *Wade*?

Judge SOTOMAYOR. No, sir, because you just have to look at my record to know that in the cases that I addressed, on all issues I follow the law.

Senator CORNYN. On what basis would George Pavia, who is apparently a senior partner in the law firm that hired you as a corporate litigator, on what basis would he say that he thinks support of abortion rights would be in line with your generally liberal instincts? He is quoted in this article saying, "I can guarantee she'll be for abortion rights." On what basis would Mr. Pavia say that, if you know?

Judge SOTOMAYOR. I have no idea, since I know for a fact I never spoke to him about my views on abortion, frankly, my views on any social issue. George was the head partner of my firm, but our contact was not on a daily basis. I have no idea why he's drawing that conclusion because if he looked at my record, I have ruled according to the law in all cases addressed to the issue of the termination of abortion rights—of women's right to terminate their pregnancy, and I voted in cases in which I have upheld the application of the Mexico City policy, which was a policy in which the government was not funding certain abortion-related activities.

Senator CORNYN. Do you agree with his statement that you have generally liberal instincts?

Judge SOTOMAYOR. If he was talking about the fact that I served on a particular board that promoted equal opportunity for people, the Puerto Rican Legal Defense and Education Fund, then you could talk about that being a liberal instinct in the sense that I promote equal opportunity in America and the attempts to ensure that. But he has not read my jurisprudence for 17 years, I can assure you. He's a corporate litigator, and my experience with corporate litigators is that they only look at the law when it affects the case before them.

[Laughter.]

Senator CORNYN. Well, I hope, as you suggested, not only liberals endorse the idea of equal opportunity in this country. That is, I think, a bedrock doctrine that undergirds all of our law. But that brings me, in the short time I have left, to the *New Haven firefighter* case. As you know, there are a number of the New Haven firefighters who are here today and will testify tomorrow. And I have to tell you, Your Honor, as a former judge myself, I was shocked to see the sort of treatment that the three-judge panel you served on gave to the claims of these firefighters by an unpublished summary order, which has been pointed out in the press would not be likely to be reviewed or even caught by other judges on the Second Circuit, except for the fact that Judge Cabranes read about a comment made by the lawyer representing the firefighters in the

press that the court gave short shrift to the claims of the firefighters.

Judge Cabranes said, "The core issue presented by this case, the scope of a municipal employer's authority to disregard examination results based solely on the successful applicant, is not addressed by any precedent of the Supreme Court or our circuit." And looking at the unpublished summary order, this three-judge panel of the Second Circuit doesn't cite any legal authority whatsoever to support its conclusion.

Can you explain to me why you would deal with it in a way that appears to be so—well, "dismissive" may be too strong a word—but that avoids the very important claim such that the Supreme Court ultimately reversed you on, that was raised by the firefighters' appeal?

Judge SOTOMAYOR. Senator, I can't speak to what brought this case to Judge Cabranes' attention. I can say the following, however: When parties are dissatisfied with a panel decision, they can file a petition for rehearing en banc. And, in fact, that's what happened in the *Ricci* case. Those briefs are routinely reviewed by judges, and so publishing by summary order—or addressing an issue by summary order or by published opinion doesn't hide a party's claims from other judges. They get the petitions for rehearing.

Similarly, parties, when they are dissatisfied with what a circuit has done, file petitions for certiorari, which is a request for the Supreme Court to review a case, and so the Court looks at that as well. And so regardless of how a circuit decided a case, it's not a question of hiding it from others.

With respect to the broader question that you are raising, which is why do you do it by summary order or why do you do it in a published opinion or in a per curiam, the question—or the practice is that about 75 percent of circuit court decisions are decided by summary order, in part because we can't handle the volume of our work if we were writing long decisions in every case; but, more importantly, because not every case requires a long opinion if a district court opinion has been clear and thorough on an issue. And in this case, there was a 78-page decision by the district court. It adequately explained the question that the Supreme Court addressed and reviewed.

And so to the extent that a particular panel considers that an issue has been decided by existing precedent, that's a question that the court above can obviously revisit, as it did in *Ricci*, where it looked at it and said, well, we understand what the circuit did, we understand what existing law is, but we should be looking at this question in a new way. That's the job of the Supreme Court. I would——

Senator CORNYN. But, Judge, even the district court admitted that a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that the exams—they knew that were the exams certified, the mayor would incur the wrath of Reverend Boise Kimber and other influential leaders of New Haven's African American community. You decided that based on their claim of potential disparate impact liability that there was no recourse, that the city was justified in disregarding the exams and, thus, denying these fire-

fighters, many of whom suffered hardship in order to study and to prepare for these examinations and were successful, only to see that hard work and effort disregarded and not even acknowledged in the court's opinion. And ultimately, as you know, the Supreme Court said that you just can't claim potential disparate impact liability as a city and then deny someone a promotion based on the color of their skin. There has to be a strong basis in evidence. But you didn't look to see whether there was a basis in evidence to the city's claim. Your summary opinion, unpublished summary order, didn't even discuss that.

Don't you think that these firefighters and other litigants deserve a more detailed analysis of their claims and an explanation for why you ultimately denied their claim?

Judge SOTOMAYOR. As you know, the court's opinion, issued after discussions en banc, recognized, as I do, the hardship that the firefighters experienced. That's not been naysayed by anyone.

The issue before the court was a different one, and the one that the district court addressed was what decision the decision makers made, not what people behind the scenes wanted the decision makers to make, but what they were considering. And what they were considering was the state of the law at the time. And in an attempt to comply with what they believed the law said and what the panel recognized as what the Second Circuit precedent said, that they made a choice under that existing law.

The Supreme Court in its decision set a new standard by which an employer and lower court should review what the employer is doing by the substantial evidence test. That test was not discussed with the panel. It wasn't part of the arguments below. That was a decision by the Court, borrowing from other areas of the law and saying we think this would work better in this situation.

Senator CORNYN. My time is up. Thank you.

Chairman LEAHY. Thank you. Thank you very much.

I will put in the record a letter of support for Judge Sotomayor's nomination from the United States Hispanic Chamber of Commerce on behalf of its 3 million Hispanic-owned business members, 16 undersigned organizations, including the El Paso Hispanic Chamber of Commerce, Greater Dallas Hispanic Chamber of Commerce, the Houston Hispanic Chamber of Commerce, the Odessa Hispanic Chamber of Commerce, and a similar letter from the Arizona Hispanic Chamber of Commerce. I had meant to put those in the record before. We will put them in the record now.

[The letters appear as a submission for the record.]

Senator SESSIONS. Mr. Chairman, I would offer a letter for the record from the National Rifle Association in which they express serious concern about the nomination of Judge Sonia Sotomayor.

Also I noticed that the head of that organization, Mr. LaPierre, wrote an article this morning raising increased concern after yesterday's testimony, and I would also offer for the record a letter from Mr. Richard Land, of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, also raising concerns.

Chairman LEAHY. Without objection, those will be made part of the record.

[The letters appear as a submission for the record.]

Chairman LEAHY. Do you have anything else?

Senator SESSIONS. Nothing else.

Chairman LEAHY. I will yield to Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman. Judge Sotomayor, good morning. Welcome back to our committee. I just want you to know that the baseball fans of Baltimore knew there was a judge somewhere that changed in a very favorable way the reputation of Baltimore forever. You are a hero and they now know it is Judge Sotomayor. You are a hero to Baltimore baseball fans.

Let me explain. The major league baseball strike, you allowed the season to continue so Cal Ripken could become the iron man of baseball in September 1995. So we just want to invite you—as a baseball fan, we want to invite you to an Orioles game and we promise it will not be when the Yankees are playing, so you can root for the Baltimore Orioles.

[Laughter.]

Judge SOTOMAYOR. That's a great invitation, and good morning, Senator. You can assure your Baltimore fans that I have been to Camden Yards. It's a beautiful stadium.

Senator CARDIN. Well, we think it is the best. Of course, it was the beginning of the new trends of baseball stadiums, and you are certainly welcome.

Before this hearing, the people of this country knew that the president had selected someone with incredible credentials to be a Supreme Court member. Now, they know the person is able and is capable and understands the law and has been able to understand what the appropriate role is for a judge in interpreting the law and has done very well in responding to the members of the U.S. Senate, which I think bodes well for your interaction with attorneys and your colleagues on the bench in having a thorough discussion of the very important issues that will affect the lives of all people in our nation.

I do want to, first, start with the judicial temperament issue and the reference to the Almanac on the Federal Judiciary. I just really want to quote from other statements that were included in that almanac, where they were commenting about you and saying that she is very good, she is bright, she is a good judge, she is very smart, she is frighteningly smart, she is intellectually tough, she is very intelligent, she has a very good commonsense approach to the law, she looks at the practical issues, she is good, she is an exceptional judge overall, she is engaged in oral argument, she is well prepared, she participates actively in oral argument, she is extremely hardworking and well prepared.

And I want to quote from one of the judges on your circuit, Judge Miner, who was appointed by President Reagan, when he said, "I don't think I go as far as to classify her in one camp or another. I think she just deserves the classification of an outstanding judge."

I say that because maybe you would like to comment to these more favorable comments about how the bar feels about your service on the bench.

Judge SOTOMAYOR. I thank those who have commented in the way they did. I think that most lawyers who participate in argument before me know how engaged I become in their arguments and trying to understand them. And as I indicated yesterday, that

can appear tough to some people, because active engagement can sometimes feel that way.

But my style is to engage as much as I can so I can ensure myself that I understand what a party is intending to tell me. I am, in terms of what I do, always interested in understanding, and so that will make me an active participant in argument.

As I noted yesterday, I have colleagues who never ask questions. There are some judges on the Supreme Court who rarely ask questions and others ask a lot of questions. Judges approach issues in different ways, with different styles, and mine happens to be on one end of the style and others choose others.

Senator CARDIN. Well, I thank you for that response. I agree with you that the Constitution and Bill of Rights are timeless documents and have served our nation well for over 200 years and are the envy of many other nations.

Now, there are many protections in the Constitution, but I would like to talk a little bit about civil rights and the basic protections in our Constitution and how we have seen a progression in the Constitution and Bill of Rights through constitutional amendments, including the 13th, 14th, 15th and 19th, through congressional action, through the passage of such bills as the Civil Rights Act of 1964, the Voting Rights Act of 1965, Supreme Court decisions that we have talked about that have changed civil rights in America and made it possible for many people to have the opportunities of this country that otherwise would have been denied.

We have made a lot of progress since the days of segregated schools and restrictions on people's opportunities to vote. But I think we would all do well to remember the advice given to us by our colleague, Senator Edward Kennedy, the former chairman of this Committee, as we talk about the civil rights struggle; he says, "The work goes on, the cause endures, the hope still lives, and the dream shall never die."

So I say that as an introduction to one area of civil rights, and that is the right to vote, a fundamental right. My own experience in 2006, that is just a few years ago, causes me to have concerns. In my own election, I found that there were lines longer in the African-American precincts to vote than in other precincts, and I was curious as to why this took place. They did not have as many voting machines. There were a lot of irregularities, and it caused a lot of people who had to get back to work to be denied their right to participate.

We also found, on election day, fraudulent sample ballots that were targeted to minority voters in an effort to diminish their importance in the election. I mention that because that happened not 50 years ago, but happened just a few years ago.

Congress renewed the Voting Rights Act by rather large votes, 98–0 in the U.S. Senate, 390–33 in the House of Representatives; this reflects a clear intent of Congress to continue to protect voters in this country.

In *Northwest Austin Municipal Utility District Number One* v. *Holder*, one justice on the court, in dictum, challenged Congress' authority to extend the civil rights case. Now, I say that knowing your view about giving due deference to Congress, particularly as it relates to expanding and extending civil rights protections.

So my question to you is tell me a little bit about your passion for protecting the right to vote, to make sure that the laws are enforced as Congress intended, to guarantee to every American the right to participate at the voting place.

Judge SOTOMAYOR. When we speak about my passion, I don't think that the issue of guaranteeing each citizen the right to vote is unique to me or that it's different among any Senator or among any group of people who are Americans.

It is a fundamental right and it is one that you've recognized, Congress has addressed for decades and has done an amazing job in passing a wide variety of statutes in an effort to protect that right.

The question that a court would face in any individual situation is whether an act of Congress conflicts with some right of either the state or an individual with respect to the issue of voting. There could be other challenges raised on a wide variety of different bases, but each case would present its own unique circumstance.

There is one case involving the Voting Rights Act where I addressed the issue of the right to vote and in that case, I issued a dissent on an en banc ruling by my court. For the public who may not understand what en banc ruling means, when the whole court is considering an issue.

In that case, if it wasn't 13, it may have been 12 members of the court, we're a complement of 13 judges, but I, right now, can't remember if we were a full complement at the time, considering an issue. The majority upheld a state regulation barring a group of people from voting.

I dissented on a very short opinion, one-paragraph opinion, saying, "These are the words of Congress in the statute it passed, and the words are that no state may impose a—and I'm paraphrasing it now. I'm not trying to read the statute, but no condition or restriction on voting that denies or abridges the right to vote on the basis of race.

I noted that given the procedural posture of that case, that the plaintiff had alleged that that's exactly what the state was doing, and I said that's the allegation on the complaint. That's what a judge has to accept on the face of the complaint. We've got to give him a chance to prove that, and that, to me, was the end of the story.

To the extent that the majority believed that—and there was a lot of discussion among the variety of different opinions in the case as to whether this individual could or could not prove his allegation and there was a suggestion by both sides that he might never be able to do it.

My point was a legal one. These are Congress' words. We have to take them at their word. And if there's an end result of this process that we don't like, then we have to leave that to Congress to address that issue. We can't fix it by ruling against what I viewed as the express words of Congress.

Senator CARDIN. Let me use your quote there, because I thought it was particularly appropriate. You said, "I trust the Congress would prefer to make needed changes itself rather than have the courts do so for it," and I think the members of this Committee would agree with you.

As you responded to Senator Grassley in regard to the *Riverkeeper* case, you said you give deference to Congress. I think we all share that. One of my concerns is that we are seeing judicial activism in restricting the clear intent of Congress in moving forward on fundamental protections.

Let me move, if I might, to the environment, which is an area that is of great concern to all of us. In the past 50 years, Congress has passed important environmental laws, including the Clean Air Act, the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the Safe Drinking Water Act, and Superfund.

Despite the progress we have made over the years, it is important that we keep advancing the protections in our environment. During your testimony yesterday, you made it clear that you understand that Senators and Members of Congress elected by the people are the ones making policy by passing laws and you also made it clear that judges apply the laws enacted and that they should do so or least they should do so with deference to the intent of Congress.

Yet, we have seen, in recent decisions of the Supreme Court, like the Solid Waste Agency of *Northern Cook County* v. *U.S. Corps of Engineers* and *Rapanos* v. *United States*, that they have forced the EPA to drop more than 500 cases against alleged polluters.

These decisions have impact and it is clear to many of us that they reject longstanding legal interpretations and ignore the science that served as the foundations for the laws passed by Congress and the intent of Congress to protect American people by providing them with clean water, clean air and a healthy environment.

As a Senator from Maryland, I am particularly concerned about that as it relates to the efforts that we are making on the Chesapeake Bay.

Now, I understand that these decisions are now precedent and they are binding and that it may very well require the Congress to pass laws further clarifying what we meant to say so that we can try to get back on track. I understand that.

But I would like you to comment and, I hope, reinforce the point that you have said that in reaching decisions that come to the bench, whether they are environmental laws or other laws to protect our society, you will follow the intent of Congress and will not try to supplant individual judgment that would restrict the protections that Congress has passed for our community.

Judge SOTOMAYOR. I believe my cases, my entire record shows that I look at the acts of Congress, as I think the Supreme Court does, with deference, because that is the bedrock of our constitutional system, which is that each branch has a different set of constitutional powers; that deference must be given to the rights of each branch in each situation; that it is exercising its powers; and, to the extent that the court has a role, because it does have a role, to ensuring that the Constitution is followed, it attempts to do that.

When I say "attempt," but it always attempts it with a recognition of the deference it owes to the elected branches in terms of setting policy and making law.

Senator CARDIN. Thank you for that response. Let me turn, if I might, to our personal backgrounds. There has been a lot of discussion here about what each of us brings to our position in public life.

Progress for women in this country has not come easily or quickly. At one time, women could not vote, could not serve on juries, could not hold property. I sit here today wanting to feel confident that the Supreme Court and its justices who make key decisions on women's rights in society will act to ensure continued progress for equality between men and women.

Now, we all agree that in rendering an individual decision, gender or ethnic backgrounds should not affect your judgment. There is an importance to diversity which I think we have all talked about. Each of us brings our life experiences to our job.

Your life experience at Princeton, I think, serves as an example. You attended the school that F. Scott Fitzgerald 90 years ago called "the pleasantist country club in America," with very restrictive policies as to who could attend Princeton University. By 1972, your freshman class, it was a different place, but still far from where it should be.

And I admire your efforts to change that at Princeton and you were actively involved in improving diversity at that school, and Princeton is a better place today because of your efforts.

I think of my own experiences at law school, University of Maryland Law School, which denied admission to Thurgood Marshall and, in my class, had very few women. Times have changed.

Justice Ginsberg said, referring to the importance of women on the bench, "I think the presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title 7."

So on behalf of myself, on behalf of my daughter and two granddaughters, I want to hear from you the importance of different voices in our schools, in our Congress, and on the Supreme Court of the United States as to how having diversity, the importance of diversity, and your views as to what steps are appropriate for government to take in helping to improve diversity.

Judge SOTOMAYOR. Your comments about your daughter and granddaughter makes me remember a letter I received when I was being nominated to the circuit court. It was from a woman who said she had 19 daughters and grandchildren and how much pride she took in knowing that a woman could serve on a court like the second circuit.

And I realized then how important the diversity of the bench is to making people feel and understand the great opportunity American provides to all its citizens, and that has value. That's clear.

With respect to the issue of the question of what role diversity serves in the society, it harkens back almost directly to your previous question. I've been overusing that word "harkens," sorry. It almost comes around to your earlier question, which is that issue is one that starts with the legislative branches and the government, the executive bodies, and employers who look at their workforce, that look at the opportunities in society, and make policy decisions about what promotes that equal opportunity in the first instance.

The court then looks at what they have done and determines whether that action is constitutional or not. And with respect at least to the education field, in a very recent set of cases, the Supreme Court looked at the role of diversity in educational decisions as to which students they would admit, and the court upheld the University of Michigan's law school admissions policy, which would—because the school believed that it needed to promote as wide a body and diverse a body of students to ensure that life perspectives, that the experience of students would be as fulsome as they wished.

And they used race there as one of many factors, but not one that compelled individual choices of the student. The court upheld that. And Justice O'Connor, in the opinion she wrote, authored, expressed the hope that in 25 years, race wouldn't even need to be considered.

In a separate case, the University of Michigan's undergraduate admissions policy, the court struck that down and it struck it down because it viewed the use of race as a form of impermissible quota, because it wasn't based on an individual assessment of the people applying, but as an impermissible violation of the equal protection clause and of the law.

These situations are always looked at individually and, as I said, in the context of the choices that Congress, the executive branch, an employer is making and the interest that it's asserting and the remedy that it's creating to address the interest it's trying to protect. All of that is an individual question for the courts.

Senator CARDIN. And you need to look at all the facts in reaching those decisions, which you have stressed over and over again. I want a justice who will continue to move the court forward in protecting those important civil rights.

I want a justice who will fight for people like Lawrence King, who, at the age of 15, was shot in school because he was openly gay. I want a justice who will fight for women like a 28-year-old Californian who was gang raped by four people because she was a lesbian. And I want a justice who will fight for people like James Byrd, who was beaten and dragged by a truck for two miles because he was black. So we need to continue that focus.

You talked about race and I think about the *Gant* case, where a 6-year-old black child was removed from school and was treated rather harshly with racial harassment. And in your dissent, you stated that the treatment this lone black child encountered during his brief time in Cook Hill's first grade to have been not merely arguable, unusual, indisputable discretion, but unprecedented and contrary to the school's established policy.

Justice Blackmun spoke, "In order to get beyond racism, we first must take an account of race." And if you ignore race completely, aren't you ignoring facts that are important in a particular case?

Judge SOTOMAYOR. Well, it depends on the context of the case that you're looking at. In the *Gant* case, for example, there were a variety of different challenges brought by the plaintiff to the conduct that was alleged the school had engaged in. I joined the majority in dismissing some of the claims as not consistent with law.

But in that case, there was a disparate treatment element and I pointed out to the set of facts that showed or presented evidence

of that disparate treatment. That's the quote that the quote that you were reading from, that this was a sole child who was treated completely different than other children of a different race in the services that he was provided with and in the opportunities he was given to remedy or to receive remedial help.

That is obviously different, because what you're looking at is the law as it exists and the promise that the law makes to every citizen of equal treatment in that situation.

Senator CARDIN. I agree. I think you need to take a look at all the facts and circumstances and to ignore race, you are ignoring an important fact.

Let me talk a little bit about privacy, if I might. Justice Brandeis describes privacy as the right to be left alone. In other words, if we must restrict this right, it must be minimal and protections must occur before any such action occurs.

The Supreme Court has advanced rights of privacy in the *Meyer* case and the *Loving* case, which established the fundamental rights of persons to raise families and to marry whom they please, regardless of race; the *Lawrence* case, which held that states cannot criminalize homosexual conduct; *Griswold*, which held that allowed for family planning as a fundamental right; and, of course, *Roe* v. *Wade*, which gave women the right to control their own bodies.

I just would like to get your assessment of the role the court faces on privacy issues in the 21st century, recognizing that our Constitution was written in the 18th century and the challenges today are far different than they were when the Constitution was written as it relates to privacy. The technologies are different today and the circumstances of life are different.

How do you see privacy challenges being confronted in the 21st century in our Constitution and in the courts?

Judge SOTOMAYOR. The right to privacy has been recognized, as you know, in a wide variety of circumstances for more than probably 90 years now, close to 100. That is a part of the court's precedence in applying the immutable principles of the Constitution, the liberty provision of the due process clause, and recognizing that that provides a right to privacy in a variety of different settings. You have mentioned that line of cases and there are many others in which the court has recognized that as a right.

In terms of the coming century, it's guided by those cases, because those cases provide the courts precedence and framework, and with other cases, to look at how we will consider a new challenge to a new law or to a new situation.

That's what precedent's do. They provide a framework. The Constitution remains the same. Society changes. The situations it brings before courts change, but the principles are the words of the Constitution guided by how precedence gives—or has applied those principles to each situation and then you take that and you look at the new situation.

Senator CARDIN. In the time that I have remaining, I would like to talk about pro bono. I enjoyed our conversation when you were in my office talking about your commitment to pro bono. I think, as attorneys, we all have a special responsibility to ensure equal justice and that requires equal access.

The Legal Aid lawyers, per capita, are about 61 per 6,800. For private attorneys, it is one per 525. This is not equal justice under the law as promised by the etching on the entrance to the United States Supreme Court.

Now, it makes a difference if you have a lawyer. If you have a lawyer, you are more likely to be able to save your home, to get the health care that you need, to be able to deal with consumer problems.

I had the honor of chairing the Maryland Legal Services Corporation. I chaired a commission that looked into legal services in Maryland. I am proud of the fact that we helped establish, at the University of Maryland Law School and University of Baltimore Law School, required clinical experiences for our law students so they not only get the experience of handling the case, but understand the need to deal with people who otherwise could not afford an attorney.

Congress needs to do more in this area. There is no question about that, and I am hopeful that we will reauthorize the Legal Service Act and provide additional resources. But I would like to get your view as to what is the individual responsibility of a lawyer for equal justice under the law, including pro bono, and how you see the role of the courts in helping to establish the efforts among the legal community to carry out our responsibility.

Judge SOTOMAYOR. I know that there's been a lot of attention paid to one speech and its variants that I've given. If you look at the body of my speeches, public service and pro bono work is probably the main topic I speak at—I speak about.

Virtually every graduation speech I give to law students, speeches I've given to new immigrants being sworn in as citizens, to community groups of all types is the importance of participation in bettering the conditions of our society, active involvement in our communities.

It doesn't have to be active involvement in politics. I tell people that. Just get involved in your community, work on your school boards, work in your churches, work in your community to improve it.

The issue of public service is a requirement under the code of the American Bar Association. Virtually every state has a requirement that lawyers participate in public service in some way. I have given multiple speeches in which I've talked to law school bodies and said, "Make sure your students don't leave your school without understanding the critical importance of public service in what they do as lawyers."

In that, we are in full agreement, Senator. To me, that's a core responsibility of lawyering. Our founding fathers, they became what they became, our founding fathers, because of their fundamental belief of involvement in their society and public service, and it's, to me, a spirit that is the charge of the legal profession, because that's what we do, we help people; in a different way than doctors do, but helping people receive justice under the law is a critical importance of our work.

Senator CARDIN. Very, very well said. I look forward to working with Congress and the courts in advancing a strategy.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Cardin.

Senator Coburn.

Senator COBURN. Thank you, Mr. Chairman. I'd ask unanimous consent to put an article from the newspaper this morning, The Washington Times.

Chairman LEAHY. Without objection it will be placed in the record.

Senator COBURN. Welcome again. First of all, let me apologize to you because I was not able to hear, although I got to read some of your testimony yesterday. We have a schedule that says we must finish health care within a certain time whether we get it right or wrong, we've got to get it done in a certain time. And so I was involved with that and I apologize.

No. 2 is I apologize to you for the outbursts that have occurred in this committee. Anybody who values life like I do and who is pro-life recognizes that the way you change minds is not yell at people, you love them and you care about their concerns and you create to a level of understanding, not condemnation. So for that, I apologize. I admire your composure and I thank the Chairman and the Ranking Member for the way they handled that as well.

I want to spend a few moments with you, but I kind of want to change the tone here a little bit in terms of what we talk about. A lot of Americans are watching this hearing and when I get together with a couple of doctors, they don't understand half of what I say. When two lawyers talk, most of us who aren't lawyers, like I'm not, have trouble following. So I want us to use words that the American people can truly understand as I both ask you questions and as you answer them. I will try to do that and I hope that you will as well because I think it benefits our country to do that.

You have been asked a lot of questions about abortion and you have said that *Roe* v. *Wade* has set a law. Where are we today? What is the settle law in America about abortion?

Judge SOTOMAYOR. I can speak to what the court has said in its precedent. In *Planned Parenthood* v. *Casey*, the court reaffirmed the court holding of *Roe* v. *Wade* that a woman has a constitutional right to terminate her pregnancy in certain circumstances.

In *Casey*, the court announced that in reviewing state regulations that may apply to that right, that the court considers whether that regulation has an undue burden on the woman's constitutional right. That is my understanding of what the state of the law is.

Senator COBURN. Let me give you a couple of cases. Let's say I'm 38 weeks pregnant and we discover a small spina bifida sac on the lower sacrum, the lower part of the back on my baby and I feel like I just can't handle a child with that.

Would it be legal in this country to terminate that child's life?

Judge SOTOMAYOR. I can't answer that question in the abstract because I would have to look at what the state of the state's law was on that question and what the state said with respect to that issue.

I can say that the question of the number of weeks that a woman is pregnant has been approached to looking at a woman's act as was changed by *Casey*. The question is is the state regulation regulating what a woman does an undue burden. And so I can't answer

your hypothetical because I can't look at it as an abstract without knowing what state laws exist on this issue or not.

And even if I knew that, I probably couldn't opine because I'm sure that situation might well arise before the court.

Senator COBURN. Well, does technology in terms of the advancement of technology, should it have any bearing whatsoever on the way we look at *Roe* v. *Wade*? For example, published reports most recently of a 21-week, 21-week, that's 142 days, fetus alive and well now at 9 months of age with no apparent complications because the technology has advanced so far that we can now save children who are born prematurely at that level.

Should that have any bearing as we look at the law?

Judge SOTOMAYOR. The law has answered a different question. It has talked about the constitutional right of women.

Senator COBURN. I understand that.

Judge SOTOMAYOR. In certain circumstances. As I indicated, the issue becomes one of what is the state regulation in any particular circumstance.

Senator COBURN. I understand. But all I'm asking is should it have any bearing?

Judge SOTOMAYOR. I can't answer that in the abstract because the question as it would come before me wouldn't be in the way that you form it as a citizen. It would come to me as a judge in the context of some action that someone is taking, whether if it is the state, the state, if it is a private citizen being controlled by the state challenging that action. Those issues are——

Senator COBURN. But viability is a portion of a lot of that, and a lot of the decisions have been made based on liability. If we now have liability at 21 weeks, why would that not be something that should be considered as we look at the status of what can and cannot happen in terms of this right to privacy that has been granted in *Roe* v. *Wade*?

Judge SOTOMAYOR. All I can say to you is what the court has done.

Senator COBURN. Right.

Judge SOTOMAYOR. And the standard that the court has applied, what factors it may or may not look at within a particular factual situation can't be predicted in a way to say yes, absolutely, that's going to be considered. No, this won't be considered.

Senator COBURN. All I'm asking is whether it should. Should viability, should technology at any time be considered as we discuss these very delicate issues that have such an impact on so many people. Your answer is that you can't answer it.

Judge SOTOMAYOR. I can't because that's not a question that the court reaches out to answer. That is a question that gets created by a state regulation of some sort or an action by the state that may or may not according to some claimant, place an undue burden on her.

We don't make policy choices in the court. We look at the case before us with the interests that are argued by the parties, look at our precedent and try to apply its principles to the arguments parties are raising.

Senator COBURN. I'm reminded of one of your coats that says you do make policy and I won't continue that.

I'm concerned and I think many others are. Does a state legislature have the right under the Constitution to determine what is death? Have we statutorily defined, and we have in 50 states and most of the territories, what is the definition of death. You think that's within the realm of the Constitution that states can do that?

Judge SOTOMAYOR. It depends on what they are applying that definition to. So there are situations in which they might and situations where that definition would or would not have applicability to the dispute before the court.

All state action is looked at within the context of what the state is attempting to do and what liabilities it is imposing.

Senator COBURN. But you would not deny the fact that states do have the right to set up statutes that define, that give guidance to their citizen, what constitutes death.

Judge SOTOMAYOR. As I said, it depends on in what context they are attempting to do that.

Senator COBURN. They are doing it so they limit the liability of others with regard to that decision which would inherently be the right of a state legislature as I read the Constitution. You may have a different response to that.

Which brings me back to technology again. As recently as 6 months ago, we now record fetal heartbeats at 14 days post conception, we record fetal brain waves at 39 days post conception. I don't expect you to answer this, but I do expect you to pay attention to it as you contemplate these big issues.

We have this schizophrenic rule of the law as we have defined death as the absence of those, but we refuse to define life as the presence of those.

All of us are dependent at different levels on other people during all stages of our development from the very early in the womb, outside of the womb, to the very late. It concerns me that we are so inaccurate, or inaccurate is an improper term. Inconsistent in terms of our application of logic.

You said that *Roe* v. *Wade* did set a law yesterday and I believe it is settled under the basis of the right to privacy which has been there. So the question I'd like to turn to next is in your ruling, the Second Circuit ruling, and I'm trying to remember the name of the case, *Maloney*, the position was that there is not an individual fundamental right to bear arms in this country. Is that a correct understanding of that?

Judge SOTOMAYOR. No, sir.

Senator COBURN. Okay. Please educate me if you would.

Judge SOTOMAYOR. In the Supreme Court's decision in *Heller*, it recognized an individual rights to bear arms as a right guaranteed by the second amendment, an important right, and one that limited the actions the Federal Government could take with respect to the position of firearms. In that case we are talking about handguns.

The *Maloney* case presented a different question. That was whether that individual right would limit the activities that states could do to regulate the possession of firearms. That question is addressed by a legal doctrine.

That legal doctrine uses the word fundamental, but it doesn't have the same meaning that common people understand that word

to me. To most people the word by its dictionary term is critically important, central, fundamental, it is sort of rock basis.

Those meanings are not how the law uses that term when it comes to what the states can do or not do. The term has a very specific legal meaning which means is that amendment of the Constitution incorporated against the states.

Senator COBURN. Through the Fourteenth Amendment?

Judge SOTOMAYOR. And others. But generally, and I shouldn't say and others, through the 14th. The question becomes whether and how that amendment to the Constitution, that protection, applies or limits the states to act.

In *Maloney*, the issue for us was a very narrow one. We recognized that *Heller* held, and it is the law of the land right now in the sense of precedent that there is an individual right to bear arms as it applies to Federal Government regulation.

The question in *Maloney* was different for us. Was that right incorporated against the states. We determined that given Supreme Court precedent, a precedent that had addressed that precise question and said it is not, so it wasn't fundamental in that legal doctrine sense, that was the court's holding.

Senator COBURN. Did the Supreme Court say in *Heller* that it was not, or did they just fail to rule on it?

Judge SOTOMAYOR. Well, they failed to rule on it, you're right. But I——

Senator COBURN. There is a very big difference there.

Judge SOTOMAYOR. I agree.

Senator COBURN. Let me continue with that. So I sit in Oklahoma in my home, and what we have today as law on the land as you see it is I do not have a fundamental incorporated right to bear arms, as you see the law today.

Judge SOTOMAYOR. It is not how I see the law.

Senator COBURN. Well, as you see the interpretation of the law. In your opinion of what the law is today, is my statement a correct statement?

Judge SOTOMAYOR. No, it's not my interpretation. I was applying both Supreme Court precedent deciding that question and Second Circuit precedent that had directly answered that question and said it's not incorporated.

The issue of whether or not it should be is a different question, and that is the question that the Supreme Court may take up. In fact, in his opinion, Justice Scalia suggested it should, but it is not what I believe. It is what the law has said about it.

Senator COBURN. So what does the law say today about the statement? Where do we stand today about my statement that I have—I claim to have a fundamental, guaranteed, spelled out right under the Constitution that is individual and applies to me the right to own and bear arms. Am I right or am I wrong?

Judge SOTOMAYOR. I can't answer the question of incorporation other than to refer to precedent. Precedent says——

Senator COBURN. I understand.

Judge SOTOMAYOR [continuing]. As the Second Circuit interpreted the Supreme Court's precedent——

Senator COBURN. I understand.

Judge SOTOMAYOR [continuing]. That it is not incorporated. It is also important to understand that the individual issue of a person bearing arms is raised before the court in a particular setting.

Senator COBURN. Context, yes.

Judge SOTOMAYOR. And by that, I mean what the court will look at is a state regulation of your right and then determine can the state do that or not. So even once you recognize a right, you are always considering what the state is doing to limit or expand that right and then decide is that Okay constitutionally.

Senator COBURN. It is very interesting to me. I went back and read the history of the debate on the Fourteenth Amendment, and for many of you who don't know, what generated much of the Fourteenth Amendment was in reconstruction. Southern states were taking away the right to bear arms by freed men, recently freed slaves.

Much of the discussion in the Congress was to restore that right of the Second Amendment through the Fourteenth Amendment to restore an individual right that was guaranteed under the Constitution.

So one of the purposes for the Fourteenth Amendment, one of the reasons it came about is because those rights were bring abridged in the southern states post Civil War.

Let me move on. In the Constitution we have the right to bear arms. Whether it is incorporated or not, it is stated there. I'm having trouble understanding how we got to a point where a right to privacy which is not explicitly spelled out but it spelled out to some degree in the Fourth Amendment, which has set a law and is fixed, and something such as the Second Amendment which is spelled out in the Constitution has not set a law and fixed.

I don't want you to answer that specifically. What I would like to hear you say is how did we get there? How did we get to the point where something that is spelled out in our Constitution isn't guaranteed to us, but something that isn't spelled out specifically in our Constitution is?

Would you give me your philosophical answer? I don't want to tie you down on any future decisions, but how did we get there when we can read this book and it says certain things and those aren't guaranteed, but the things that it doesn't say are?

Judge SOTOMAYOR. One of the frustrations with judges and their decisions by citizens is that, and this was an earlier response to Senator Cornyn.

What we do is different than the conversation that the public has about what it wants the law to do. We don't, judges, make law. What we do is we get a particular set of facts presented to us, we look at what those facts are, what in the case of different constitutional amendments is, what states are deciding to do or not do, and then look at the Constitution and see what it says and attempt to take its words and the principles and the precedents that have described those principles and apply them to the facts before you.

In discussing the Second Amendment as it applied to the Federal Government, Justice Scalia noted that there had been long regulations by many states on a variety of different issues related to the possession of guns.

He wasn't suggesting that all regulation was unconstitutional. He was holding in that case that DC's particular regulation was illegal.

As you know, there are many states that prohibit felons from possessing guns. So does the Federal Government. So it's not that we make a broad policy choice and say this is what we want, what judges do. What we look at is what other actors in the system are doing, what their interest in doing it is and how that fits to whatever situation they think they have to fix, what Congress or state legislature has to fix.

All of that is the court's function. So I can't explain it philosophically. I can only explain it by its setting and what the function of judging is about.

Senator COBURN. Thank you. Let me follow up with one other question.

As a citizen of this country, do you believe innately in my ability to have self-defense of myself? Personal self-defense. Do I have a right to personal self-defense?

Judge SOTOMAYOR. I'm trying to think if I remember a case where the Supreme Court has addressed that particular question. Is there a constitutional right to self-defense? I can't think of one. I could be wrong, but I can't think of one.

Generally, as I understand, most criminal law statutes are passed by states. I'm also trying to think if there is any Federal law that includes a self-defense provision or not. I just can't.

What I was attempting to explain is the issue of self-defense is usually defined in criminal statutes by the state's laws. I would think, although I haven't studied all of the state's laws. I'm intimately familiar with New York.

Senator COBURN. But do you have an opinion or can you give me your opinion of whether or not in this country I personally as an individual citizen have the right to self-defense?

Judge SOTOMAYOR. As I said, I don't know. I don't know if that legal question has been ever presented.

Senator COBURN. I wasn't asking about the legal question. I'm asking about your personal opinion.

Judge SOTOMAYOR. But that is sort of an abstract question with no particular meaning to me outside of——

Senator COBURN. Well, I think that's what American people want to hear, Your Honor. They want to know, do they have a right to personal self-defense. Could the Second Amendment mean something under the Fourteenth Amendment? Does what the Constitution, how they take the Constitution, not how our bright legal minds, but what they think is important.

Is it Okay to defend yourself in your home if you're under attack? In other words, the general theory is do I have that right? And I understand if you don't want to answer that because it might influence your position that you might have in a case, and that's a fine answer with me. Those are the kinds of things that people would like for us to answer and would like to know.

Not how you would rule or what you are going to rule, and specifically what you think about it, but just yes or no. Do we have that right?

Judge SOTOMAYOR. I know it's difficult to deal with someone like a judge who is so sort of—whose thinking is so cornered by law.

Senator COBURN. I know.

Judge SOTOMAYOR. Could I——

Senator COBURN. Kind of like a doctor. I can't quit using doctor terms.

Judge SOTOMAYOR. That's exactly right. But let me try to address what you are saying in the context that I can, which is what I have experience with, which is New York criminal law because I was a former prosecutor.

I am talking in very broad terms, but under New York law, if you are being threatened with imminent death or very serious injury, you can use force to repel that. That would be legal.

The question that would come up and does come up before juries and judges is how imminent is the threat? If the threat was in this room, I'm going to come get you and you go home and get, or I go home, I don't want to suggest I am by the way. Please, I don't want anybody to misunderstand what I'm trying to say.

If I go home, get a gun, come back and shoot you, that may not be legal under New York law because you would have alternative ways to defend——

Senator COBURN. You will have lots of explaining to do.

Judge SOTOMAYOR. I'd be in a lot of trouble then. But I couldn't do that under a definition of self-defense. So that is what I was trying to explain in terms of why in looking at this as a judge, I'm thinking about how that question comes up and how the answer can differ so radically given the hypothetical facts before you.

Senator COBURN. The problem is we doctors think like doctors. It is hard to get out of the doctor's skin. Judges think like judges, lawyers think like lawyers.

What American people want to see is inside, what your gut says. Part of that is why we are having this hearing.

I want to move to one other area. You have been fairly critical of Justice Scalia's criticism of the use of foreign law in making decisions. I would like for you to cite for me either in the Constitution or in the oath that you took outside of treaties the authority that you can have to utilize foreign law in deciding cases in a court's law in this country.

Judge SOTOMAYOR. I have actually agreed with Justice Scalia and Thomas on the point that one has to be very cautious even in using foreign law with respect to the things American law permits you to. That is in treaty interpretation or in conflicts of law because it is a different system of law.

Senator COBURN. But I accepted that. I said outside of those. In other areas where you will sit in judgment, can you cite for me the authority either given in your oath or the Constitution that allows you to utilize laws outside of this country to make the decisions about laws inside this country?

Judge SOTOMAYOR. My speech and my record on this issue, because I have never used it to interpret the Constitution or to interpret American statute is that there is none. My speech has made that very clear.

Senator COBURN. So you stand by it. There is no authority for a Supreme Court Justice to utilize foreign law in terms of making decisions based on the Constitution or statutes?

Judge SOTOMAYOR. Unless the statute requires you or directs you to look at foreign law, and some do by the way, the answer is no. Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law.

Senator COBURN. Well, let me give you one of your quotes. 'To suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that is based on a fundamental misunderstanding. What you would be asking American judges to do is to close their mind to good ideas. Nothing in the American legal system prevents us from considering those ideas.'

We don't want judges to have closed minds, just as much as we don't want judges to consider legislation and foreign law that is developed through bodies, elected bodies outside of this country to influence either rightly so or wrongly so, against what the elected representatives and Constitution of this country says.

So would you kindly explain the difference that I perceive in both this statement versus the way you just answered?

Judge SOTOMAYOR. There is none. If you look at my speech, you will see that repeatedly I pointed out both that the American legal system was structured not to use foreign law, it repeatedly underscored that foreign law could not be used as a holding as precedent or to interpret the Constitution of the statute.

What I pointed out to in that speech is that there is a public misunderstanding of the word use. What I was talking about, one doesn't use those things in the sense of coming to a legal conclusion in a case.

What judges do, and I cited Justice Ginsburg, is educate themselves. They build up a story of knowledge about legal thinking, about approaches that one might consider. But that is just thinking. It's an academic discussion when you're talking about thinking about ideas. Then it is how most people think about the citation of foreign law in a decision.

They assume that if there is a citation to foreign law, that is driving the conclusion. In my experience when I have seen other judges cite foreign law, they are not using it to drive the conclusion, they are using just to point something out about a comparison between American law or foreign law. But they are not using it in the sense of compelling a result.

Senator COBURN. I'm not sure I agree with that on certain Eighth Amendment and Fourteenth Amendment cases.

Let me go to another—I have just a short period of time. Do you feel—it has been said that we should worry about what other people think about us in terms of how we interpret our own law, and I'm paraphrasing not very well I believe.

Is it important that we look good to people outside of this country? Or is it more important that we have a jurisprudence that is defined correctly and followed correctly according to our Constitution? And whatever the results may be, it is our result rather than a politically correct result that might please other people in the world?

Judge SOTOMAYOR. We don't render decisions to please the home crowd or any other crowd. I know that because I have heard speeches by a number of Justices, that in the past, Justices have indicated that the Supreme Court hasn't taken many treaty cases, that maybe it should think about doing that because we are not participating in the discussion among countries on treaty positions that are ambiguous.

That may be a consideration to some Justices. Some have expressed that as a consideration. My point is you don't rule to please any crowd. You rule to get the law right under its terms.

Senator COBURN. Thank you. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Coburn.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman, and welcome again, Your Honor. I have to say, before I get into the questions that I have for you, that I, like many, many, many Americans, feel enormous pride that you are here today. And I was talking with some friends in Providence when I was home about your nomination, and I said, "It actually gives me goose bumps to think about the path that has brought you here today and, more importantly, to think about"—because it is not about you—more important to think what that means about America, that path. And they said, "No, no. You can't say 'goose bumps.' You have to say 'piel de gachina.'" And so I promised them that I would, so I am keeping that promise right now.

But I want to tell you that I think in the way you have handled yourself in this Committee so far, you have done nothing but to vindicate and reinforce the pride that so many people feel in you. And I hope that as this process continues—I know these days are long, and it can be a bit of an order—I hope that you very much feel buoyed and sustained by that pride and that optimism and that confidence that people across this country feel for you and that so many people in this room feel for you. So I wanted to say that.

I also wanted to fulfill another promise, which is the one I made to you, that in my opening statement I said I would ask you to make a simple pledge, and that simple pledge is that you will decide cases on the law and the facts before you; that you will respect the role of Congress as representatives of the American people; that you will not prejudge any case, but will listen to every party that comes before you; and that you will respect precedent and limit yourself to the issues that the Court must decide.

May I ask you to make that pledge?

Judge SOTOMAYOR. I can. That's the pledge I would take if I was—that I took as a district court judge, as a circuit court judge, and if I am honored to be confirmed by this body, that I would take as a Supreme Court Justice, yes.

Senator WHITEHOUSE. Thank you.

Some of my colleagues have raised questions about your role at the Puerto Rican Legal Defense and Education Fund many years ago before you left that organization to become a Federal trial judge in 1992, I guess it was. I just want to clarify. That was clearly a part of your history and your package that came to the Senate at the time of those confirmations, when you were confirmed both

in 1992 and 1997, so this is nothing new to the Senate. Is that correct?

Judge SOTOMAYOR. That's correct.

Senator WHITEHOUSE. And in terms of the way that the Puerto Rican Legal Defense and Education Fund operated, you were a member of the board. Is that correct?

Judge SOTOMAYOR. I was.

Senator WHITEHOUSE. Did the attorneys for the Puerto Rican Legal Defense and Education Fund make it a practice to vet their legal filings with the board first? Did the board approve individual briefs and arguments that were made by attorneys for the organization?

Judge SOTOMAYOR. No, because most of us on the board didn't have civil rights experience. I had actually—when I was a prosecutor in private practice, that wasn't my specialty of law. Even if they tried to show it to me, I don't know that I could have made a legal judgment even if I tried. That was not our function.

Senator WHITEHOUSE. And I think that is customary in charitable organizations for the board not to sign off specifically on briefs and other legal filings that the attorneys make. Certainly in the years I have spent on the boards of charitable organizations, it has never been something presented to me. So I appreciate that.

In 1992 and in 1997, when the Senate was, again, fully aware of all that, was there, to your recollection, the objection made in those confirmations?

Judge SOTOMAYOR. I don't believe any question was asked about my service on the Puerto Rican Legal Defense and Education Fund. The fund is an organization that has and has been considered in the mainstream of civil rights organizations like the NAACP and the Mexican American Legal Defense and Education Fund, promotes the civil rights of its community.

Senator WHITEHOUSE. Let me turn to some more general questions, if I may, and one has to do with the role of the jury—not just in trials. Obviously, you are eminently familiar with the role of juries in trials. I think you will be the only member of the United States Supreme Court, if you are confirmed, to actually have had Federal trial judge experience, which I think is a valuable attribute. But I am not thinking so much about the role of the jury in the courtroom as I am about the role of the jury in the American system of government.

When the Constitution was set up, as you know so well, the Founders made great efforts to disaggregate power, to create checks and balances, and the matrix of separated powers that they created has served us very, very well.

In the course of that, or as a part of that, the Founders also revealed some very strongly felt concerns about the hazards of both unchecked power and of the vulnerability of the legislative and executive branches to either corruption or to being consumed and overwhelmed by passing passions. And I would love to hear your thoughts on the importance of the jury in that American system of Government, and if you could, with particular reference to the concerns of the Founders about the vulnerabilities of the elected branches.

Judge SOTOMAYOR. Like you, I am—and perhaps because I was a State prosecutor and I have been a trial judge, and so I've had very extensive experience with jury trials in the American criminal law context. I have had less in the civil law context as a private practitioner, but much more as a district court judge.

I can understand why our Founding Fathers believed in the system of juries. I have found in my experience with juries that virtually every juror I have ever dealt with, after having experienced the process, came away heartened, more deeply committed to the fundamental importance of their role as citizens in that process. Every juror I ever dealt with showed great attention to what was going on, took their responsibilities very seriously.

I had a juror who was in the middle of deliberations, on her way to my courtroom—not on her way to my courtroom—on her way home from court on the previous day broke her leg, was in the hospital the entire night, came back the next morning on time, in a wheelchair, with a cast that went up to her hip. What a testament both to that woman and to the importance of jury service to our citizens. I was very active in ensuring that her service was recognized by our court.

It has a central role. Its importance to remember is that it hasn't been fully incorporated against the States. Many States limit jury trials in different ways. And so the question of what cases require a jury trial and what don't is still somewhat within the discretion of States. But it is a very important part of a sense of protection for defendants accused in criminal cases, and one that I personally value from my experience with it.

Senator WHITEHOUSE. And does the Founders' concern about the potential vulnerabilities or liabilities about the elected branch illuminate the importance of the jury system?

Judge SOTOMAYOR. Senator, I—as I see the jury system, I don't know exactly—I don't actually—and I've read the Federalist Papers and I've read other historical accounts. The jury system was—I thought the basic premise of it was to ensure that a person subject to criminal liability would have a group of his or her peers pass judgment on whether that individual had violated the law or not.

To the extent that the Constitution looked to the courts to determine whether a particular act was or was not constitutional, it seems to me that that was a different function than what the jury was intended to serve. The jury, as I understood it, was to ensure that a person's guilt or innocence was determined by a group of peers. To the extent that that has a limit on the elected branches, it's to ensure that someone is prosecuted under the law and that the law is applied to them in the way that the law is written and intended.

Senator WHITEHOUSE. And where the jury requirement applies to civil trials, the argument would be the same. Correct?

Judge SOTOMAYOR. Yes.

Senator WHITEHOUSE. Again, on the question of the American system of Government, how would you characterize the Founders' view of any exercises of unilateral or unchecked power by any of the three branches of Government in the overall scheme?

Judge SOTOMAYOR. The Constitution by its terms sets forth the powers and limits of each branch of Government, and so to the ex-

tent that are limits recognized in the Constitution, that is really what the Constitution intends. The Bill of Rights, the Amendments set forth there are often viewed as limits on Government action. And so it's a question always of looking at what the Constitution says and what kind of scope it is for a Government action at issue.

Senator WHITEHOUSE. Would you feel, in light of all of the attention—very, very careful and thoroughly thought out attention—that the Constitution gives to establishing and enforcing a whole variety of different checks and balances among the different powers of Government, that a judge who was presented with an argument that a particular branch of Government should exercise or have the authority to exercise unilateral unchecked power in a particular area should approach that argument with a degree of heightened caution or attention?

Judge SOTOMAYOR. The best framework that has been set out on this question of a unilateral act by one branch or another—but usually the challenge is raised when the Executive is doing something, because the Executive executes the law, takes the action, typically. The best description of how to approach those questions was done by Justice Jackson in his concurring opinion in the *Youngstown* case. And that opinion laid out a framework that generally is applied to all questions of Executive action, which is that you have to look at the powers of each branch together. You have to start with what has Congress said, express or implicitly. And if it's authorized to do something, to let the President do something, then the President's acting at the height of his powers. If Congress has implicitly prohibited—expressly or implicitly prohibited something, then the President's acting at the lowest ebb of his powers.

There is a zone of twilight, which is the zone in between, which is: Has Congress said something or not said something?

In all of the situations, once you've looked at what Congress has done or not done, you then are directed to look at what the President's powers may be under the Constitution minus whatever powers Congress has in that area. So the whole exercise is really, in terms of Congress and the Executive, an exercise of the two working together. And, in fact, that's the basic structure of our system of Government. That's why Congress makes the laws. The President can veto them, but he can't make them. He can regulate if the Congress gives him the authority to do so, and within other delegated authorities or—I shouldn't use the word "delegated" because it has a legal meaning. But the point is that that question is always looked at in light of what Congress has said on the issue and in light of Congress' power as specified in the Constitution.

Senator WHITEHOUSE. Let me change to a more law enforcement-oriented topic. I appreciate, first of all, very much your service in District Attorney Morgenthau's office. It is an office that prosecutors around the country look at with great pride and sense of its long tradition and of the very great capability of the prosecutors who serve in it. It is a very proud office, and I am delighted that you served there, and I think it says a great deal about you that, coming out of law school and college with the stellar academic record that you had and an entire world of opportunities open to you, you chose that rather poorly paid office. And since you have met 89 of us, I doubt you remember all of our conversations, but

when you and I had the chance to meet, we compared who had the worst office as a new prosecutor, and I think you won.

[Laughter.]

Senator WHITEHOUSE. And so it was a very important moment for, at that point, a quite new lawyer to make a very significant statement about who you were and what your purpose was. And so I very much appreciate that you made that choice, and I think prosecutors like my colleagues Senator Klobuchar and many others around this country, our Chairman, Senator Leahy, made that choice over the years, and it is one that I think merits a salute.

One of the things that prosecutors have to deal with all the time is search and seizure and warrants, and my question has to do with the warrant requirement under the Constitution. I see the Constitution as being changeless, timeless, and immutable. What changes is society, as you pointed out in your testimony earlier, and technology. And so new questions arise, and I would be interested in your reaction to the difference between the experience of society and the technology of society when the Founders set up the warrant requirement originally, and today.

When the Founders set up the warrant requirement originally, when the sheriff or somebody went to seize property, to bring it in as evidence for a trial or to condemn it as contraband, that was sort of the end of it. If it was evidence, when it was done it was returned and went back; particularly papers were returned, and that was the end of it. Then came the Xerox machine, and now the Government could make copies of what they took, and it was returned, as always, just as the Founders had intended, but copies were sprinkled throughout Government files, very often ones that ended up in archives buildings in dusty boxes that would have taken enormous effort to locate. But, nevertheless, they remained available.

And nowadays, with electronic databases and electronic search functions, matters that once would have been returned to the individual and that envelope of privacy that was opened by the warrant would have been closed again are now potentially eternally available to Government, eternally searchable, and it raises some very interesting privacy questions that we will have to face in this Congress and in this Senate as we begin to take on issues particularly of cyber security, cyber attack, cyber terrorism, and take advantage of what technology can bring to bear in the continued struggle against terrorist extremists.

So I would be interested in your thoughts on how the Constitution, which is unchanged through all of that, what analysis you would go through to see whether the change from a quickly opening and closing privacy envelope to one that is now essentially open season forever, how would you go about analyzing that as a judge, given that the Constitution is a fixed document?

Judge SOTOMAYOR. I think, as I understand your question, Senator, that there are two issues—if not more, but the two that I note as more starkly for me in your question is the one of the search and seizure and the Fourth Amendment as it applies to taking evidence from an individual and use it against him or her in a current proceeding.

Senator WHITEHOUSE. Yes, which is a constant. That stayed the same.

Judge SOTOMAYOR. That is the structure.

Not so long ago, the Supreme Court dealt with a technologically new situation, which was whether an individual had a right to expect a warrant to be gotten before law enforcement flew over his or—I think it was a "his" in that case—his home and took readings of the thermal energy emanating from his home, and then going in to see if the person was growing marijuana.

Senator WHITEHOUSE. The *FLIR* case.

Judge SOTOMAYOR. Exactly. And in that case, the reason for that case is that apparently—I'm not an expert in marijuana growing, but apparently, when you're growing marijuana, there's certain heating lights that you need. At least that's what the case was describing. And it generates this enormous amount of heat that wouldn't generally come from a home unless you were doing something like this.

And what the Court did there—in an opinion by Justice Scalia, I believe it was—is it looked at the embedded questions of privacy in the home that underlied the unreasonable search and seizure, and the Court there, as I mentioned, determined that acts taken in the privacy of one's home would commonly not be expected to be intruded upon unless the police secured a warrant. And to the extent that the law had generally recognized that if you worked actively to keep people out of your home—you locked your windows, you locked your doors, you didn't let people walk by and peek through, you didn't stand at your front door and show people what you were doing—that you were exhibiting your expectation of privacy.

And to the extent that new technology had developed that you wouldn't expect to intrude on that privacy, then you were protected by the Warrant Clause, and the police had an obligation to go talk to a magistrate and explain to them what their evidence was and let the magistrate—I use "the magistrate" in that more global sense. It would be a judge, but you would let a judge decide whether there was probable cause to issue the warrant—reasonable suspicion, probable cause—probable cause to issue the warrant.

That's how the courts addressed the unreasonable—or have addressed, the Supreme Court has, the unreasonable search and seizure, and balance the new technology with the expectations of privacy that are recognized in the Fourth Amendment.

Yes, I thought a separate question which in my mind is different than the right to privacy with respect to personal information that could be otherwise available to the public as a byproduct of a criminal action or as a byproduct of your participation in some regulated activity of the Government. There are situations in which, if your industry is regulated, you are going to make disclosures to the Government, and then the question becomes how much and what circumstances can then Government make copies, put it in an electronic data base or use it in another situation.

So much of that gets controlled by the issues you are saying Congress is thinking about, which is, What are people's rights of privacy in their personal information? Should we as Congress as a matter of policy regulate that use?

The Court itself had been commanded by Congress to look at certain privacy information of individuals and guard it from public disclosure in the data bases you are talking about. So we have been told, "Don't go using somebody's Social Security number and putting it in a data base." That is part of a public document, but we have been told, "Don't do that." And there is a reason for that: because there is not only the issues of identity theft but other harms that come to people from that situation.

So that broader question, as we many, is not one that one could talk about a philosophy about. As a judge, you have to look at the situation at issue, think about what Congress has said about that in the laws, and then consider what the Constitution may or may not say on that question, depending on the nature of the claim before the Court.

Senator WHITEHOUSE. Your Honor, I thank you. I wish you well.

Judge SOTOMAYOR. Thank you.

Senator WHITEHOUSE. And I congratulate you on your appearance before this Committee so far.

Judge SOTOMAYOR. Thank you, sir.

Chairman LEAHY. Senator Whitehouse, thank you. I appreciate the comments getting into the area of criminal law.

Of course, Senator Whitehouse has served as both a U.S. Attorney and as an Attorney General and brings a great depth of knowledge, as do several on both the Republican and Democratic side, to this Committee. And I also appreciate you taking less than your time. I hope maybe you will be setting a standard as we go forth.

[Laughter.]

Chairman LEAHY. We will take a 15-minute break.

[Recess at 11:35 a.m. to 11:53 a.m.]

Chairman LEAHY. There has been an interest expressed by—I was going to say by all the Senators, but most Senators have left the hearing room. Do not think that does not mean that there is not going to be more questions, Judge, because there will be this round and another round and if it is a case of all the questions having been asked, but not everybody has asked all the questions, some will come back and ask them again.

What we are going to do, we are going to have Senator Klobuchar and Senator Kaufman ask questions. We will then break for lunch. We will then have Senator Specter and Senator Franken ask questions. I am saying this for the purpose, also, of those who have to schedule and plan.

We will take a break for lunch after these two Senators. We will then go into the traditional closed door session, which will be held in the Senate Judiciary Committee room.

So, Senator Klobuchar, we seem to be heavy on prosecutors here. She is also a former prosecutor. I yield to you.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Good afternoon, Judge. Thank you, again, for all of your patience and your thoughtful answers. Really, everyone has been focusing on you sitting there. I have been focusing on how patient your mother has been through this whole thing, because I ran into her in the restroom just now and, I can tell you, she has a lot she would like to say. She has plenty of stories that she would like to share about you. I thought I might miss my questioning opportunity.

Judge SOTOMAYOR. Senator, don't give her the chance.

Senator KLOBUCHAR. But I was thinking she is much more patient than my mother has been, who has been waiting for this moment, for me to ask these questions, and leaving messages, like, "How long do these guys have to go on?"

My favorite one, the recent one, was, "I watched Senator Feinstein and she was brilliant. What are you going to do?" So let us move on.

Judge SOTOMAYOR. We should introduce our mothers. Okay?

Senator KLOBUCHAR. Exactly. I have some quick questions here at the beginning just to follow-up on some of the issues raised by my colleagues. Senator Coburn was asking you about the *Heller* case and Second Amendment issues, and I personally agree with the *Heller* case. But I remember that yesterday that you said that in *Maloney*, your second circuit case, that you were bound by precedent in your circuit, but that you would keep an open mind if the Supreme Court takes up the question of whether the Second Amendment can be incorporated against the states. Is that right?

Judge SOTOMAYOR. Yes, Senator. I take every case case-by-case and my mind is always open and I make no prejudgments as to conclusions.

Senator KLOBUCHAR. Okay. Then a follow-up on a question that Senator Whitehouse was asking you about the Puerto Rican Legal Defense Fund. You were on that board. One just minor follow-up. But isn't it true that the ABA, that their code of conduct, the American Bar Association code of conduct bars board members from engaging in litigation because of a lack of an actual lawyer-client relationship?

Judge SOTOMAYOR. Yes.

Senator KLOBUCHAR. Then, finally, just one point. We have heard so much about your speech in which you used the phrase "wise Latina," and I am not going to go over that again. But I did want to note for the record that you made a similar comment in another speech that you gave back in 1994, which you have provided not only in this proceeding, but you also provided it when you came before the Senate for confirmation to the circuit court in 1997 and 1998.

No Senator at that time—do you remember them asking you about it or making any issue about it at the time?

Judge SOTOMAYOR. No.

Senator KLOBUCHAR. All right. Thank you. Now, we can move on to what I want to talk about, which is your work as a criminal prosecutor. Senator Whitehouse initially asked a few questions about that.

You were quoted in the New York Times a while back about your time there and you said, "The one thing I have found is that if you come into the criminal justice system on a prosecutorial or defense level thinking that you can change the ills of society, you are going to be sorely disappointed. This is not where those kinds of changes have to be made."

Do you want to elaborate on that a little bit?

Judge SOTOMAYOR. By the time a criminal defendant ends up in court, they've been shaped by their lives. If you want to give people the best opportunity of success at life, it's a message I deliver fre-

quently to my community, it has to be through early childhood forward.

If you're waiting to do that once they're before a judge in court, your chances of success have diminished dramatically. And so one of my messages in many of my speeches to my community groups is pay attention to education.

It's the value mom taught me, but her lesson was not lost on me when I became a prosecutor and it's a lesson that I continue to promote, because I so fervently believe it.

The success of our communities depends on us improving the quality of our education of our children and parental participation in ensuring that that happens in our society.

Senator KLOBUCHAR. It also reminded me of that comment about some of the comments you have made about the limited roles, that a prosecutor has one role, and the limited role that a judge may have to respect that judicial role of not making the laws, but interpreting the laws. Would that be a correct summary?

Judge SOTOMAYOR. That is. In the statement I made to the newspaper article, I was focusing on a different part of that, but it is. As a prosecutor, my role was not to look at what I thought the punishment should have been, because that was set in law.

Sentences are set by Congress within statutory ranges, and my role was to prosecute on behalf of the people of the State of New York. And that role is different than one that I would do if I were a defense attorney, whose charge is to do something else to ensure that a defendant is given a fair trial and that the government has proven its case beyond a reasonable doubt.

But we cannot remedy the ills of society in a courtroom. We can only apply the law to the facts before us.

Senator KLOBUCHAR. I think Justice Ginsberg made a similar comment in an article this weekend, in an interview she did, as she was talking about—this was her exact quote, "The legislature can make the change, can facilitate the change, as laws like the Family Medical Leave Act do"—she was talking about family arrangements—"but it is not something a court can decree." "A court can't tell the man," she said, "'you've got to do more than carry out the garbage.'"

I thought that was another way of—you do not have to comment on that, but it was another way of making the same point.

The other thing that I wanted to focus on was just that role as a prosecutor, some of the difficult decisions you have to make about charging cases, for instance. Sometimes you have to make a difficult decision to charge a family member maybe in a drunk driving case where someone kills their own child because they were drunk or you have to make a decision when the court of public opinion has already decided someone is guilty, but you realize you do not have enough evidence to charge the case.

Do you want to talk about maybe a specific example of that in your own career as a prosecutor or what goes into your thinking on charging?

Judge SOTOMAYOR. I was influenced so greatly by a television show in igniting the passion that I had as being a prosecutor, and it was Perry Mason. For the young people behind all of you, they may not even know who Perry Mason was.

But Perry Mason was one of the first lawyers portrayed on television and his storyline is that in all of the cases he tried, except one, he proved his client innocent and got the actual murderer to confess.

In one of the episodes, at the end of the episode, Perry Mason, with the character who played the prosecutor in the case, were meeting up after the case and Perry said to the prosecutor, "It must cause you some pain having expended all that effort in your case to have the charges dismissed." And the prosecutor looked up and said, "No. My job as a prosecutor is do justice and justice is served when a guilty man is convicted and when an innocent man is not."

And I thought to myself that's quite amazing to be able to serve that role; to be given a job, as I was, by Mr. Morgenthal, a job I'm eternally grateful to him for, in which I could do what justice required in an individual case.

And it was not without bounds, because I served a role for society and that role was to ensure that the public safety and public interests were fully represented. But prosecutors, in each individual case, at least in my experience particularly under the tutelage of Mr. Morgenthal, was we did what the law required within the bounds of understanding that our job was not to play to the home crowd, not to look for public approval, but to look at each case, in some respects, like a judge does, individually.

And that meant, in some cases, bringing the tough charge, and I was actually known in my office for doing that often, but that's because I determined it was appropriate often. But periodically, I would look at the quality of evidence and say there's just not enough.

I had one case with an individual who was charged with committing a larceny from a woman and his defense attorney came to me and said, "I never ever do this, but this kid is innocent. Please look at his background. He's a kid with a disability. Talk to his teachers. Look at his life. Look at his record. Here it is," and he gave me the file.

Everything he said was absolutely true. This was a kid with not a blemish in his life. And he said, "Please look at this case more closely." And I went and talked to the victim and she—I had not spoken to her when the case was indicted. This was one of those cases that was transferred to me, and so it was my first time in talking to her, and I let her tell me the story and it turned out she had never seen who took her pocketbook.

In that case, she saw a young man that the police had stopped in a subway station with a black jacket and she thought she had seen a black jacket and identified the young man as the one who had stolen her property.

The young man, when he was stopped, didn't run away. He was just sitting there. Her property wasn't on him. And he had the background that he did. And I looked at that case and took it to my supervisor and said, "I don't think we can prove this case." And my supervisor agreed and we dismissed the charges.

And then there are others that I prosecuted, very close cases, where I thought a jury should decide if someone was guilty and I prosecuted those cases and, more often than not, got conviction.

My point is that that is such a wonderful part of being a prosecutor. That TV character said something that motivated my choices in life and something that holds true.

And that's not to say, by the way, and I firmly, firmly believe this, defense attorneys serve a noble role, as well. All participants in this process do, judges, juries, prosecutors and defense attorneys. We are all implementing the protections of the Constitution.

Senator KLOBUCHAR. Thank you. That was very well said. I want to take that pragmatic experience that you had not just as a civil litigator, but also as a prosecutor. A lot has been said about whether judges' biases or their gender or their race should enter into decision making.

I actually thought that Senator Schumer did a good job of asking you questions where, in fact, you might have been sympathetic to a particular victim or to a particular plaintiff, but you ruled against them. That actually gave me some answers to give to this baggage carrier that came up to me at the airport in Minneapolis.

It was about a month ago, after you had just been announced, and he came up and he said, "Are you going to vote for that woman?" At first, I did not even know what he was talking about. I said, "What?" He said, "Are you going to vote for that woman?" I said, "Well, I think so, but I want to ask her some questions."

He said, "Well, aren't you worried that her emotions get in front of the law?" I thought if anyone had heard the cases, the *TWA* case, where you decided against—had to make a decision from some very sympathetic victims, of families of people who had been killed in a plane crash, and a host of other cases where you put the law in front of where your sympathies lie, I think that would have been a very good answer to him.

But another piece of it, but it is a very different part of it, is the practical experiences that you have had, the pragmatic works that you have done. I just wanted to go through some of the cases that you have had, the criminal cases that you have handled as a judge and talk to you a little bit about how that pragmatic experience might be helpful on the courts; not leading you to always side with the prosecution, obviously, but helping you to maybe ferret through the facts, as you have been known to be someone that really focuses on the facts.

One of them is the *United States* v. *Falso* case and this is a case where child pornography was found in a guy's home and on his computer. You ruled that although the police officers did not have probable cause for the search warrant, that the evidence obtained in the search, the child pornography and the computer, should still be considered under the good faith exception to the inclusionary rule, because the judge had not been knowingly misled. In other words, it was a mistake.

Can you talk about that case and how perhaps having that kind of experience on the front line helps you to reach that decision, because there was someone, I believe, that dissented in that case?

Judge SOTOMAYOR. That case presented a very complicated question in second circuit law. There had been two cases addressing how much information a warrant has to contain and what kind in order for the police to search a defendant's home or—I shouldn't

say a home—a computer to see if the computer contained images of child pornography.

The two cases—I should say the two panels—I wasn't a member of either of those panels—had very extensive discussion about the implications of the cases because they involved the use of the Internet and how much information the police should or should not have before they looked to get a warrant to search someone's computer, because the computer does provide people with freedom of speech, at least with respect to accessing information and reading it and thinking about it.

In the case before me, I was looking at it in the backdrop of the conflict that it appeared to contain in our case law and what our case law said was important for a police officer to share with a judge and examined the facts before my case, looking at the information that the police had before them and considering whether, in light of existing second circuit law, as it addressed this issue, had the police actually violated the Constitution—I hope I can continue.

Chairman LEAHY. You can continue. That was not a comment from above. I have certain powers as Chairman, but not that much.

Senator KLOBUCHAR. Please go on.

Judge SOTOMAYOR. Whether they should get a warrant or not. And one member of the court said yes and they had violated the Constitution and I joined that part of the opinion because I determined, examining all of the facts of that case and the law, that that was the way the law—the result the law required.

But then I looked at what the principles underlying the unreasonable search and seizures are without a warrant and looked at the question of what was the doctrine that underlay there, and what doctrine it underlays is that you don't want the police violating your constitutional rights without a good faith basis, without probable case.

And that's why you have a judge make that determination. It's why you require them to go to a judge. And so what I had to look at was whether we should make the police responsible for what would have been otherwise a judge's error, not their error.

They gave everything they had to the judge and they said to the judge, "I don't know." Even if they thought they knew, that isn't what commands the warrant. It's the judge's review.

So I was the judge in the middle. One judge joined one part of my opinion. The other judge joined the other part of the opinion. And so I held that the act violated the Constitution, but that the evidence could still be used because the officers had—there was, in law, a good faith exception to the error in the warrant.

Senator KLOBUCHAR. I think you made a similar finding with different underlying facts in *United States* v. *Santa*, when that involved a clerical error, and then that was a case where the underlying arrest warrant—where someone had been arrested, they found cocaine, and you allowed that in on the basis that the underlying arrest warrant, even though it was false, there had not been a warrant out there, it had been removed, that that was a clerical error and they could still use the cocaine.

Judge SOTOMAYOR. Well, in fact, it's a holding the Supreme Court—an issue the Supreme Court addressed just this term.

Senator KLOBUCHAR. Exactly.

Judge SOTOMAYOR. And came out—or I came out the way the Supreme Court did on that.

Senator KLOBUCHAR. The *Herring* case.

Judge SOTOMAYOR. Yes.

Senator KLOBUCHAR. Yes. Very good. The piece of that case in the Supreme Court that is most interesting to me in terms of that issue we have been talking about, the practical knowledge and how that plays into decisions, is the *Melendez-Diaz* case, which you were not involved in. It was a U.S. Supreme Court case.

But this is just from my own practical work as a prosecutor and it was a contested case with the Supreme Court. It did not divide ideologically. In fact, both Justice Breyer and Justice Roberts were in the dissent that Justice Kennedy wrote. It was a 5–4 decision.

In that case, the issue was whether or not, with the confrontation clause, whether or not lab workers, crime lab workers should be called in to have to testify for drugs and what the tests showed within the drugs and things like that.

I just wondered what your reaction was to that case, how you would have analyzed it. I agree with the dissent in that case. I think that this could really open up 90 years of precedent. I think it is unreasonable for what we should expect of the criminal justice system, and there has been some pretty strong language in the dissent of a fear that this will create some difficulty for prosecutors to follow through on their cases and get the evidence in.

Judge SOTOMAYOR. It's always difficult to deal with people's disappointments about cases, particularly when they have personal experiences and have their own sense of the impact of a case.

I was a former prosecutor, it's difficult proving cases as it is, calling more witnesses adds some burdens to the process. But at the end, that case is a decided case and so it's holding now. It is holding and that's what guides the court in the future on similar issues, to the extent there can be some.

As I said, I do recognize that there can be problems, as a former prosecutor, but that also can't compel a result. And all of those issues have to be looked at in the context of the court's evaluation of the case and the judge's view of what the law permits and doesn't permit.

Senator KLOBUCHAR. I will say there was an interesting story a few weeks ago about jokes that you have been tenacious about getting to the bottoms of facts when you have cases and there were actually some experts that criticized you for spending too much time trying to figure out the facts, which I thought was a pretty unique criticism in the halls of criticism.

In fact, you were defended by a former clerk to Clarence Thomas who said that you are extraordinarily thorough and a judge would ordinarily be praised for writing thorough opinions.

So when we were talking about *Melendez-Diaz* and some of those issues, it seems to me that when you have looked at cases involving criminal justice or really any issue, whether it is that *Vermont Ferry* case that you did or other ones, you really did delve into the facts.

Do you want to talk a little bit about why that is important?

Judge SOTOMAYOR. The facts are the basis for the legal decision. A judge deals with a particular factual setting and applying the law to those facts. To the extent that there's any criticism that I do that on the court of appeals, we're not fact-finders, but we have to ensure that we understand the facts of the case to know what legal principle we're applying it to.

A judge's job, whether it's on the trial level, the circuit court or even the Supreme Court, is not to create hypothetical cases and answer the hypothetical case. It's to answer the case that exists.

And so in my view, and I'm not suggesting any justice does this or doesn't do it, but I do think that my work as a state prosecutor and a trial judge sensitizes me to understanding and approaching cases starting from the facts and then applying the law to those facts as they exist.

And, again, I don't want to suggest that not all judges do that, but because I—because of my background, perhaps like Justice Souter, who also has the reputation of carefully looking at the facts and applying the law to the facts, it's maybe that background that people are noticing and noticing where we picked up that habit.

Senator KLOBUCHAR. Very good. In a report issued last week, The Transactional Record Access Clearinghouse, I did not know there was such a thing, found that you sent more convicts to prison and handed out longer sentences than your colleagues did when you were a district court judge.

One statistic found that you handed out sentences of greater than 6 months to 48 percent of convicted criminals in white collar cases, while your colleagues gave out sentences of 6 months or more to just 36 percent.

You were also twice as likely as your colleagues to send white collar criminals to 2 years or more in prison. I have found the white collar cases to be some of the most challenging cases that we had in our office when I was a prosecutor. They were challenging because there was oftentimes sympathy.

Maybe this is dating myself, 10 years ago, there used to be more sympathy, but there was sympathy to people who were pilots. We had tax evasion cases with pilots or we had a judge that we prosecuted who had a half-day of his friends come and testify that he should not go to jail, including the former Miss America.

So I have found those cases to be difficult. Could you talk a little bit about your view of sentencing, in general, and sentencing of white collar defendants, in particular?

Judge SOTOMAYOR. It should be remembered that when I was a district court judge, the sentencing laws were different than they have become during my 12 years on the court of appeals. That—and it makes me sound ancient, but back in the days when I was a district court judge, the sentencing guidelines were focused on the amount of a fraud and didn't consider the number of victims or the consequences on the number of victims of a crime.

Perhaps because of my prosecutorial background, perhaps because I considered the perspective of prosecutors who came before me, that the guidelines—and their arguments—that the guidelines didn't adequately consider the number of victims and that that should be a factor, because someone who commits 100,000 $1—not $1—$1,000 crimes may be as culpable as the person who does a

one-time act of $100,000, and depending on the victims and the impact on the victims.

Those are factors that one should consider. And so many of the white collar sentences that you are talking about were focused on looking at the guidelines and what the guideline were addressing and ensuring that I was considering, as the sentencing statutes require the court to do, at all of the circumstances of the crime.

I suspect that may drive one of the reasons why I may have given higher white collar crime sentences than some of my colleagues; not to suggest they didn't listen to the argument, but they may have had a different perspective on it.

I should tell you that my circuit endorsed that factor as a consideration under the guidelines, somewhat after I had started imposing sentences on this view, but they also agreed that this was a factor that courts could consider in fashioning a sentence.

Crime is crime and to the extent that you're protecting the interests of society, you take your cues from the statute Congress gives and the sentencing range that Congress sets. And so to the extent that in all my cases I balanced the individual sentence with, as I was directed to, the interests that society sought to protect, then I applied that evenhandedly to all cases.

So it's important to remember the guidelines were mandatory. And so I took my charge as a district court judge seriously at the time to only deviate in the very unusual case, which was permitted by the guidelines.

Senator KLOBUCHAR. What do you think about the change now that they are guidelines, suggested guidelines, and not mandatory?

Judge SOTOMAYOR. As you know, there's been a great number of cases in the Supreme Court, the *Booker*/*Fanfan* line of case. The *Booker*/*Fanfan* case determined they were guidelines.

My own personal experience as an appellate judge is that because the Supreme Court has told the district courts to give serious consideration to the guidelines, there's been a little bit—not a little bit—there's been discretion given to district courts, but they are basically still staying within the guidelines and I think that's because the guidelines prove useful as a starting point to consider what an appropriate sentence may be.

Senator KLOBUCHAR. Just one last question, Mr. Chairman. All these guys have been asking about your baseball case and they have been talking about umpires and judges as umpires.

Did you have a chance to watch the all-star game last night? Because most of America did not watch the replay of your hearing, they might have been watching it.

Judge SOTOMAYOR. I haven't seen television for a very long time. But I will admit that I turned it on for a little while last night.

Senator KLOBUCHAR. Because I will say—and maybe you did not turn it on on this moment, but your Yankee, Derek Jeter, tied it up, but you must know that he scored only because there was a hit by Joe Mauer of the Minnesota Twins. I just want to point that out.

All right. Thank you very much, Judge.

Judge SOTOMAYOR. That's what teamwork helps you with.

Senator KLOBUCHAR. Okay. Thank you.

Chairman LEAHY. I am resisting any Red Sox comment.

Judge SOTOMAYOR. I should beg you all not to hold that against me.

Chairman LEAHY. I am not going to use that against you. I did see a photograph of the president throwing out the ball. I know the photographer well, and he did a very good shot of two pictures.

Senator Kaufman is probably as knowledgeable as anybody on this Committee, having run it for years before becoming a Senator. I have said before, Judge, that Senators are merely constitutional requirements or impediments to the staff. We know who really runs the place.

Senator Kaufman, it is over to you, sir.

Senator KAUFMAN. Thank you, Mr. Chairman.

Chairman LEAHY. And I should make one announcement. You have been hearing some banging going on here. Apparently the air conditioning went out which will probably come as welcome news to some of the press who are freezing in the sky boxes up here.

But it is not welcome news here with the crowd going on and they are working on it, but we are going to keep going as long as we can. Senator Kaufman?

Senator KAUFMAN. Thank you, Mr. Chairman. One of the toughest assignments—I have been here long enough to know the toughest assignment is to stand between the audience and lunch, so I am going to try to gear up under that. Good afternoon, Judge.

Judge SOTOMAYOR. Good afternoon, Senator. It is good talking to you again.

Senator KAUFMAN. It is good to see you. And I want to kind of take a different track. I think Senator Whitehouse and Senator Klobuchar talked a lot about your time as a prosecutor. I would like to move on to kind of your time as a commercial litigator. You were a prosecutor for 5 years, then you decided to go into commercial practice.

What were the thoughts behind you deciding when you left the DA's office to go into commercial practice?

Judge SOTOMAYOR. Well, actually it is a continuation of what I explained to Senator Klobuchar. I had in the DA's office realized that in the criminal law system, we could not affect changes of opportunity for people. We were dealing with a discreet issue and applying the law to the situation at hand.

But if there was going to be an increase of opportunity for all people, that that had to involve an increase in economic opportunity and in economic development for different communities.

So that in combination with my desire to broaden my own personal understanding of as many aspects of law as I could, I decided that I should change my focus and concentrate on commercial matters rather than criminal matters.

It also guided much of the pro bono work I did thereafter which also involved questions of finances and economic opportunities. And so I served on the New York State Mortgage Board and the New York State Mortgage Office was involved in giving individuals affordable housing or loans for affordable housing.

I was a board member of the New York City Campaign Finance Board. Those were activities that motivated in large measure because of my growing belief that economic opportunities for people were the way to address many of the growth needs of communities.

Senator KAUFMAN. Can you tell us a little bit about your commercial practice? What actually were you dealing with as a litigator?

Judge SOTOMAYOR. It was a wonderful practice because unlike some of my law school friends, I very much wanted to go into a small law firm where I could have hands on practice. Having been a prosecutor and having made all of the decisions, individual decisions I made, I thought to myself as I was leaving the DA's office, I do not think I can go to those firms where I would be the fifth guy on the totem pole, that I wanted to have more hands on experience. So I went to a smaller firm where I actually until I became a partner tended to work directly with the partner and would often counsel businesses. I did a wide variety of commercial issues.

I was involved in grain commodity trading, people buying home grown grains of all kinds, you can name them all, including orange peels as feed for animals, and the contracts that they were involved in in doing those trades.

Our firm represented a very impressive list of client, including Ferrari the car manufacturer. I did a great deal of their work as it related to their dealer relationships and to their customer relationships. So I involved myself in those commercial transactions which were different focus, different emphasis.

I also represented—not me, but the firm, but I counseled the client on many of its dealer relations issue of Pirelli Tire Corporation. These are names I suspect many people know.

Senator KAUFMAN. Yes.

Judge SOTOMAYOR. And from the fashion designer, and I think there are many people who know how famous that fashion house design is, had trademark questions. I participated with the partner who founded that practice within the law firm and she had a very untimely death.

Actually she came from her home ill to vote on my partnership at the firm and I became a partner and a couple of months later, she passed away. But she had worked with me and introduced me to the intellectual property area of law.

I worked on real estate matters, I worked on contract matters of all kinds, licensing agreements, financing agreements, banking questions. There was such a wide berth of issues that I dealt with.

Senator KAUFMAN. And how did that practice help you on the District Court and then on the Circuit Court of Appeals?

Judge SOTOMAYOR. Actually, one of the lessons I learned from my commercial practice, I learned in the context first of my grain commodity trading, but in the work as it related to all commercial disputes, one main lesson.

In business, the predictability of law may be the most necessary in the sense that people organize their business relationships by how they understand the court's interpret their contracts.

I remember being involved in any number of litigations where at the end of the litigation as part of a settlement, I would draft up a settlement agreement between the parties. Quite often it involved creating an ongoing new business relationship or a temporary continuation of a business relationship until they could wind down.

I would draft up the agreement like a litigator, like the judge I try to be. Say it in simple works. I would give it to my corporate

partners, and I should not say it this way. I would get back stuff that sometimes I would look at and say, what does this gobbly goop mean? They would laugh at me and say, it has meaning. This is how the courts have interpreted it. It is very important to the relationship of the parties that they know what the expectations are in law about their relationship.

Then I understood why it was important to phrase things in certain ways. It made me very respectful about the importance of predictability in terms of court interpretation of business terms because that was very, very critical to organizing business relationships in our country.

Senator KAUFMAN. The other basic job as a District Court judge is to kind of avoid trial, kind of get people settled before they get to trial. How did your commercial experience help you deal with that?

Judge SOTOMAYOR. It is interesting because I remember one case, and I cannot give you details because I would be breaching confidentiality.

But I remember a client coming in to me with a fairly substantial litigation and I looked at the client and I said, "I evaluated the case." I said, "There are some novel theories here. I really think you can win, but there is a serious question about the cost to get there because these are all the things that we would have to do to get there and it is going to cost you," it was millions of dollars that I estimated.

The client went to another lawyer who gave them a different evaluation. They went with that other lawyer. My firm lost all that income. But the client came back afterwards. The figure I put on the litigation was exactly what they spent and more.

Settlements are generally in the business world economic decisions, balancing both the cost of litigation and the right of the issue. But business has a different function than courts. Business function is to do business, to do their work, to sell products,—relationships and litigation are different.

As a judge when I was a District Court judge, most of my focus was on doing what I used to do as a lawyer, to talk to parties not about the merits of their case, but about the consideration of thinking about creative and new ways to approach a legal dispute so they could avoid the cost of litigation.

As a Circuit Court judge, I am very cognizant of the cost of litigation and look at what parties are doing in the courts below, bearing that in mind.

Senator KAUFMAN. You talked about your experience as Circuit Court judge. How did your being a District Court judge help you when you became a Circuit Court judge?

Judge SOTOMAYOR. Well, no question that it made me more sensitive to the importance of facts and looking at the facts the court has found and the facts that the parties are arguing and looking at the record to understand what went on.

I often point to this example. When I sit on panels, and our court is blessed by having judges with a wide variety of circumstances. I know for me because I was a trial judge, I would read all the briefs in a case, I would read the District Court decision.

If parties were arguing something and the District Court didn't address it, my first question to my law clerks were, go back to the record and tell me why not. Most judges address arguments that people are raising and I would get to oral argument and if I was the only judge with a trial experience, I would look at the parties and say, did you argue this before the District Court?

I could see some of the antennas going up for those colleagues who hadn't had that experience. They said, I never even thought of that. Look in fact if that was the case.

There are all sorts of doctrines that do not permit parties to argue new things on appeal. And so that is how the experience comes in, both the sensitivity to facts and the sensitivity to ensure that you're applying law to those facts.

Senator KAUFMAN. I know you have this commercial experience because as I said in my opening statement, I am concerned about business cases. I think they are really important and I am also concerned that the current courts, being in court too often, seems to disregard law and congressional policy choices when it comes to business cases.

I think in light of economic crisis, Congress probably, not probably, will definitely pass a financial regulatory reform package.

I would just like to make sure that the system is not undermined by the court because they have a different view of what government regulation's all about.

Do you believe that Congress has the constitutional authority to regulate financial markets?

Judge SOTOMAYOR. You have just raised the very first question that will come up when Congress passes an Act.

I can assure you, knowing every time that Congress passes an Act, there is a challenge by somebody. As soon as it is applied to someone in a way that they do not like, they are going to come into court. So I cannot answer that question.

Senator KAUFMAN. I am sympathetic to that and I really should have phrased it—just in general. Not with regard to any case, anything at all about Congress' constitutional authority to regulate financial markets.

Judge SOTOMAYOR. Well, I cannot answer that question because it invites an answer to the potential challenge.

What I can say to you is that Congress has certain constitutional powers. One of them is to pass laws affecting interstate commerce. So the question will be the nature of whatever statute Congress passes, what facts it relies upon and the remedy that it institutes.

So the question would depend on the nature of the statute and what it is doing.

Senator KAUFMAN. But Congress does basically have the ability to regulate markets.

Judge SOTOMAYOR. Well, it has the ability to—the constitutional terms are to make laws that involve commerce between the states. Those are the words and generally that has been interpreted to mean pass laws that affect commercial interstate transaction.

Senator KAUFMAN. To get to a more broader question about laws enacted by Congress, what should a judge's role be in viewing the wisdom of the statute, in interpreting it?

When Congress passes a law, what is needed to whether the judge thinks it is a good law or bad law, the wisdom in passing it. What role does that play in the law?

Judge SOTOMAYOR. I am trying to think if there is any situation in which a judge would have occasion to judge in that way. Policymaking, making of laws is up to Congress. A judge's personal views as to whether that policy choice is good or bad has no role in evaluating Congress' choice.

The question for us is always a different one, which is what has Congress done? Is it constitutional in the manner in which it has done it. But policy choices are Congress' choices. In all areas, deference has to be given to that choice.

Senator KAUFMAN. How about regulation adopted by regulatory agencies?

Judge SOTOMAYOR. Deference has been given in that area by the courts as well. Generally one looks at what Congress has said about that question because executive agencies have to apply and talk about regulations in light of what Congress has commanded. But those are also entitled to deference in different factual situations.

Senator KAUFMAN. We've been talking for a few minutes about securities law.

What characterizes the securities law docket in the southern district of New York in the Second Circuit?

Judge SOTOMAYOR. Everything. We are the home of New York City. Our jurisdiction is, and I am sure that another state is going to complain, but we are the business capital of the world. That is how it has been described by others.

So we deal with every variant of securities law as one could imagine, from investment questions to misleading statements to investors to whatever Congress has regulated, our circuit will have a case on it. Or I should say it usually starts with the District Courts and it will perk up to the Circuit Court. But if you have a securities law, we will likely eventually hear the argument.

Senator KAUFMAN. And this will be valuable if you are confirmed.

Judge SOTOMAYOR. I presume so because it has been a part of my work both as a District Court and a Circuit Court judge.

Senator KAUFMAN. You had a case with a suit against the New York Stock Exchange where the plaintiff sued the New York Stock Exchange for failure to effectively regulate the market.

You ruled to give the New York Stock Exchange immunity from the suit even though you noted that the alleged misconduct appeared egregious.

To reach that sort of decision, how do you reconcile the rationale for immunity with the fact that it deprives the plaintiffs of a remedy in situations where they have been wronged? As you said, egregiously wronged.

Judge SOTOMAYOR. It is somewhat important to recognize the limited role that courts serve and the issue of remedy also is one where one has to talk about remedy against whom and for what.

In the ways that these individuals were injured, they were injured by third parties who had done allegedly illegal acts against them. The court's ruling did not affect their ability to take action

against those individuals and clearly that is always difficult in some situations when the individual has been arrested, et cetera. But they are still remedies that law provides in terms of whatever assets those individuals have, whatever criminal actions the government may take, often funds are created to reimburse victims.

The question here was whether an agency that in case law was seen to have a quasi governmental function, whether you could sue that agency for conduct that—for not regulating the other individuals adequately in helping to prevent the activity.

But regulation comes in different forms by the quasi governmental agencies and what they can do depends on the exercise of discretion under the laws as they exist at the time.

So the immunity doctrine wasn't looking at the issue of how to recompense the individuals, it was looking at the quasi functions of government. So there is a different perspective that was given to the judges in that case.

Senator KAUFMAN. In another securities case that interests me, *Press* v. *Quake & Riley*, in that case you and your fellow panel members deferred to the SEC's interpretation of its own regulation even though you seemed somewhat skeptical of the interpretation.

Tell us about how you came to the conclusion you did in that case.

Judge SOTOMAYOR. Well, there is a doctrine of Chevron deference and it goes to the issue of who makes the decisions and that goes to policy questions.

To the extent that an agency interpretation is not inconsistent with congressional commands, express commercial commands, a judge cannot substitute their own judgment of what policies should be or regulations should be, but is commended to give deference.

There are obviously in every situation a set of exceptions to when you do not, but you have to then apply a consideration of each of those exceptions in the particular circumstance before you.

There have been other situations in which I have ruled and said no, the agency is not interpreting the statute in accordance with what the panel viewed was Congress' intent. Yesterday I believe one of the other Senators asked me about the *Riverkeeper* case.

Senator KAUFMAN. Yes.

Judge SOTOMAYOR. The Supreme Court came to a different view of what the words Congress used meant. But the point is that the role of course is not to substitute their own judgments. It is to apply the principles of law in accordance with the acts that agencies are doing.

Senator KAUFMAN. And one more securities question. In recent years it seems like regulators were often too lax when it came to ferreting out securities fraud.

What role do the private rights of action, that is cases brought by investors rather than government have in enforcing our securities laws?

Judge SOTOMAYOR. It is a right Congress has given presumably because Congress has made a policy choice that it is a way to ensure that individual's injuries are remedied.

That is a part of many of our securities laws and our anti-trust laws. Government doesn't have unlimited resources to pursue all individual injuries. And so in some situations, Congress makes a

choice to grant a private cause of action and in some it doesn't. That is a legislative choice.

Senator KAUFMAN. Turning to the anti-trust law, what was your experience in the anti-trust law?

Judge SOTOMAYOR. As a——

Senator KAUFMAN. Both in practice and a judge, both of them.

Judge SOTOMAYOR. I am trying to think—I do not remember having direct experience in anti-trust law when I was in private practice. I do not think I did. So I had very little.

I am trying to think of any of my cases on the District Court and major league baseball strike was one of them. It is the one that I can think of.

I had anti-trust cases there as well. Often the cases settled actually, and so managing those cases was the prime function I had as a District Court judge.

If you will give me a chance to look at my District Court decisions again to see if—and what other cases in the anti-trust area I may have ruled upon in District Court, I can get back to you, Senator, either at the next round or in a written question. I just do not——

On the Circuit Court it is different. I have participated directly in writing opinions and joining panels on opinions. So I've had at least two if not three or four or five of those cases.

Senator KAUFMAN. Yesterday Senator Kohl asked about the *Leegin* case which is striking and it overturned 96 years of precedent that effectively legalized private agreements to prevent discount retailing.

You said that both the majority and the—case had reason to question the economic theory underlining the original precedent. I do not want you to comment on *Leegin* in particular, but what is the role of the court in using economic theory to interpret acts of Congress?

Judge SOTOMAYOR. Well, you do not use economic theory to determine the constitutionality of congressional action. That is a different question I think than the one that *Leegin* addressed. What *Leegin* addressed was how the court would apply congressional act, the anti-trust laws to a factual question before it. That's a different issue because that doesn't do with questioning the economic choices of Congress. That goes to whether or not in reviewing the action of a particular defendant what view the court is going to apply to that activity.

In the *Leegin* case, the court's decision was look, we have prior case law that says that this type of activity is always anti-competitive. The court in reconsidering that issue in the *Leegin* case said well, there has been enough presented in the courts below to show that maybe it is not in some activity as anti-competitive. So we are not going to subject it to an absolute bar, we are going to subject it to a review under rule of reason.

That is why I said it is not a question of questioning Congress' economic choices or the economic theories that underlay its decisions in a legislation. They weren't striking down the anti-trust laws.

What the court was trying to do was figure out how it would apply that law to a particular set of facts before it.

Senator KAUFMAN. In Illinois Brick, a Supreme Court case dealing with anti-trust law, one of the classic cases, Justice White wrote, "You can say whether to overturn precedent, we must bear in mind the considerations of Stare Decisis weigh heavily in the area of statutory construction, where Congress is free to change this court's interpretation of its legislation."

Do you agree with Justice White?

Judge SOTOMAYOR. I think that that—as you may know, the doctrine of Stare Decisis is not dependent on one factor.

Senator KAUFMAN. Right.

Judge SOTOMAYOR. The court considers a variety of different factors, including the administrative workability of a law, the reliance factor that society has put into that rule, that precedent, the cost to change it, whether the underlying doctrines in related areas, the underlying framework of related areas would lead a court to question whether the prior precedent really has a framework that's consistent with an understanding in this area that has been developed in other cases. And finally, has there been a change in society that shows that the factual findings upon which the older case was premised may be wrong.

There is always the question as part of that analysis and other factors the courts may think about as to whether the older rule has been affirmed by the court and how often, over what period of time.

To the extent that Justice White is talking about a factor that the court should put into that mix, the court has recognized in its Stare Decisis jurisprudence that all of the factors weigh into the decision. You think about why and under what circumstances you should alter the course of the court's interpretation as set forth in prior precedent.

Senator KAUFMAN. I am concerned because recently there has been erosion in anti-trust, both in the courts and the enforcement. It has made it much easier for financial institutions to become so massive, they are in effect too big to fail.

Should a court sitting on anti-trust consider the systemic risk to the marketplace as injected by a financial institution being too big to fail?

Judge SOTOMAYOR. Well, the purposes of the anti-trust theory is premised on ensuring competition in the marketplace. The question, like the one you pose, is one that would come to the court in a particular context and a challenge to some approach the court has used in this area.

I obviously cannot say absolutely yes in a hypothetical, but obviously the court is always looking at what activity is claimed to be illegal under the anti-trust laws and what effect is has on anti-competitive behavior.

The question frequently in anti-trust is is a particular area subject to per se barring or is it subject to the rule of reason, and the two have different approaches to the question.

Senator KAUFMAN. Thank you, Judge. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Kaufman. I mentioned before, it is almost 1. We will take a break until 2. At 2, we will recognize first Senator Specter and then Senator Franken.

When their questions are finished, we will go into the traditional closed door session which will be held not in this room, but in the Senate Judiciary Committee room. Following that, we will come back in here and if there are Senators that have further questions, they will be recognized not to exceed 20 minutes each.

I would hope that if the question has already been asked and answered, they may want to resist the temptation to do it again, but they have that right to take the full 20 minutes if they do.

I realize a lot of the questions have been asked, but not everybody has asked the same question and so they may want to. But they have that right. That's what we will do. We will stand recessed until then.

[Whereupon, at 1 p.m., the meeting recessed for lunch.]

After Recess [2:03 p.m.]

Chairman LEAHY. Judge, what did you do with your mother?

[Laughter.]

Judge SOTOMAYOR. She needed a short break, but it wasn't because of Senators Specter or Franken.

Chairman LEAHY. Like Amy Klobuchar, I had a nice chat with her this morning, and she was talking about when she first became a nurse and compared notes with my wife, and they both agreed that that is when nurses truly had to be nurses. Now they are nurses-plus, with the advances in medicine.

I just discussed this again with Senator Sessions. We will go first to Senator Specter, then to Senator Franken, and then we will recess and go into the other room for the closed session.

Senator Specter, of course, is a former Chairman of this Committee, one of the most senior Members of the Senate, and one of the most experienced. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Welcome back, Judge Sotomayor. You have held up very well. Of all of the proceedings in the Senate, this is the most exacting on the witness. Years ago, as you know, in the case of *Ashcraft* v. *Tennessee*, they said it was unconstitutional to subject a suspect to relay grilling, but that doesn't apply to nominees. And your family has been here. My wife, Joan Specter, who has been a soldier in her own right, says it is a lot harder to listen to me than it is to make a speech herself. And you are engaged.

I think beyond doing very well on stamina, you have shown intellect and humor and charm and pride and also modesty. So it has been a very good hearing. Notwithstanding all of those qualities, the Constitution says we have to decide whether to consent, and that requires the hearing process and the questions.

Before going into a long list of issues which I have on the agenda—separation of power and warrantless wiretaps and secret CIA programs and voting rights and the Americans with Disabilities Act and a woman's right to choose and the Environmental Protection Agency and the Clean Water Act and television and the Second Amendment—I would like to make an observation or two.

There has been a lot of talk about a wise Latina woman, and I think that this proceeding has tended to make a mountain out of a molehill. We have had a consistent line of people who are nominees who make references to their own backgrounds. We all have our perspective. Justice O'Connor talked about her life experience.

Justice Alito talked about his family suffering from ethnic slurs. Justice Thomas from Pin Point, Georgia, emphasized, talked about putting himself in the shoes of other people. And Justice Scalia talked about being in a racial minority.

The expectation would be that a woman would want to say something to assert her competency in a country which denied women the right to vote for decades, when the glass ceiling has limited people, where there is still disparagement of people on ethnic background.

Just this month in a suburb of Philadelphia, Hispanic children were denied access to a pool for whites only, as were African American children, so I can see how someone would take pride in being a Latina woman and assert herself.

A lot has been made of the issue of empathy, but that characteristic is not exactly out of place in judicial determinations. We have come a long way on the expansion of constitutional rights. Oliver Wendell Holmes' famous statement that the life of the law is experience, not logic; Justice Cardozo in *Palko* v. *Connecticut* talked about changing values; and the Warren Court changed the Constitution practically every day, which I saw, being at the district attorney's office—the changes in search and seizure, confessions, Miranda, right to counsel. Who could have thought that it would take until 1963 to have the right to counsel in *Gideon* v. *Wainwright*?

We have heard a lot of talk about the nomination proceeding of Judge Bork, and they have tried to make "Bork" into a verb, somebody being Bork'd. Well, anybody who looks at that record will see that it is very, very different. We had a situation where Judge Bork was an advocate of original intent from his days writing a law review article in the Indiana Law Review. And how can you have original intent when the 18th Amendment was written by a Senate on equal protection with the Senate galleries which were segregated, or where you have Judge Bork who believed that equal protection applied only to race and ethnicity, didn't even apply to women?

But it was a very, very thorough hearing. I spent, beyond the hearing, days in three long sessions, 5 hours with Judge Bork, so it was his own approach to the law which resulted there. But you had an evolution of constitutional law which I think puts empathy in an Okay status, in an Okay category.

Now on to the issues.

I begin with an area of cases which the Court has decided not to decide, and those cases can be even more important than many of the cases which the Court decides. The docket of the Court at the present time is very different from what it was a century ago. In 1886, the docket had 1,396 cases, decided 451. A hundred years later, there were only 161 signed opinions in 1985; in 2007, only 67 signed opinions.

During his confirmation hearings, Chief Justice Roberts said the Court "could contribute more to the clarity and uniformity of the law by taking more cases."

Judge Sotomayor, do you agree with that statement by Chief Justice Roberts?

Judge SOTOMAYOR. I know, Senator Specter, that there is questions by many people, including Senators and yourself, of Justice Roberts and other nominees about this issue. Can the Court take on more? To the extent that there is concern about it, not that public opinion should drive the Justices to take more cases just to take them, but I think what Justice Roberts was saying is the Court needs to think about its processes to ensure that it's fulfilling its——

Senator SPECTER. Judge Sotomayor, how about more cases?

Judge SOTOMAYOR. Well, perhaps I need to explain to you that I don't like making statements about what I think the Court can do until I've experienced the process.

Senator SPECTER. Then let me move on to another question.

One case that the Court did not take involved the Terrorist Surveillance Program, which I think, arguably, posed the greatest conflict between congressional powers under Article I in enacting the Foreign Intelligence Surveillance Act, which provided for the exclusive way to get wiretaps. The President disregarded that in a secret program called the Terrorist Surveillance Program, didn't even tell the Chairman of the Judiciary Committee, which is the required practice or accepted practice; didn't tell the Intelligence Committees where the law mandates that they be told about such programs. It was only disclosed by the New York Times. Those practices confront us to this day with reports about many other secret cases not disclosed.

The Federal District Court in Detroit found the Terrorist Surveillance Program unconstitutional. The Sixth Circuit in a 2–1 opinion said there was no standing. The dissent I think pretty conclusively had the much better of it on asserting standing. The Supreme Court of the United States denied certiorari, didn't even take up the case to the extent of deciding whether it shouldn't take it because of lack of standing.

I wrote you a letter about this, wrote a series of letters, and gave you advance notice that I would ask you about this case. I am not asking you how you would decide the case, but wouldn't you agree that the Supreme Court should have taken that kind of a major conflict on separation of powers?

Judge SOTOMAYOR. I know it must be very frustrating to you to——

Senator SPECTER. It sure is. I was the Chairman who wasn't notified.

Judge SOTOMAYOR. No. I am sure——

Senator SPECTER. And he was the Ranking Member who wasn't notified.

Judge SOTOMAYOR. I can understand not only Congress' or your personal frustration, and sometimes of citizens, when there are important issues that they would like the Court to consider. The question becomes what do I do if you give me the honor to serve on the Court. If I say something today, is that going to make a statement about how I am going to prejudge someone else's——

Senator SPECTER. I am not asking you to prejudge. I would like to know your standards for taking the case. If you have that kind of a monumental, historic conflict, and the Court is supposed to de-

cide conflicts between the executive and the legislative branches, how can it possibly be justified not to take that case?

Judge SOTOMAYOR. There are often, from what I understand—and that's from my review of Supreme Court actions and cases of situations in which they have or have not taken cases, and I've read some of their reasoning as to this. I know that with some important issues they want to make sure that there isn't a procedural bar to the case of some type that would take away from whether they're, in fact, doing what they would want to do, which is to——

Senator SPECTER. Well, was there a procedural bar? You had weeks to mull that over because I gave you notice.

Judge SOTOMAYOR. Senator, I'm sorry. I did mull this over. My problem is that without looking at a particular issue and considering the cert. brief style, the discussion of potential colleagues as to the reasons why a particular issue should or should not be considered, the question about——

Senator SPECTER. Well, I can tell you are not going to answer. Let me move on.

On a woman's right to choose, Circuit Judge Luttig in the case of *Richmond Medical Center* said that v. *Planned Parenthood* v. *Casey* was "super-*stare decisis*." Do you agree with Judge Luttig?

Judge SOTOMAYOR. I don't use the word "super." I don't know how to take that word. All precedent of the Court is entitled to the respect of the doctrine of stare decisis.

Senator SPECTER. Do you think that *Roe* v. *Wade* has added weight on stare decisis to protect a woman's right to choose by virtue of *Planned Parenthood* v. *Casey*, as Judge Luttig said?

Judge SOTOMAYOR. That is one of the factors that I believe courts have used to consider the issue of whether or not a new direction should be taken in the law. There is a variety of different factors the Court uses, not just one.

Senator SPECTER. But that is one which would give it extra weight. How about the fact that the Supreme Court of the United States has had 38 cases after *Roe* v. *Wade* where it could have reversed *Roe* v. *Wade*? Would that add weight to the impact of *Roe* v. *Wade* on stare decisis to guarantee a woman's right to choose?

Judge SOTOMAYOR. The history of a particular holding of the Court and how the Court has dealt with it in subsequent cases would be among one of the factors as many that a Court would likely consider. Each situation, however, is considered in a variety of different viewpoints and arguments but, most importantly, factors that the Court applies to this question of should precedent be altered in a way.

Senator SPECTER. Well, wouldn't 38 cases lend a little extra support to the impact of *Roe* and *Casey* where the Court had the issue before it, could have overruled it?

Judge SOTOMAYOR. In *Casey* itself——

Senator SPECTER. Just a little impact?

Judge SOTOMAYOR. *Casey* itself applied—or an opinion authored by Justice Souter talked about the factors that a Court thinks about in whether to change precedent, and among them were issues of whether or not or how much reliance society has placed in the prior precedent; what are the costs that would be occasioned by changing it; was the rule workable or not; have either factual

or doctrinal basis of the prior precedent altered, either from developments in related areas of law or not, to counsel a re-examination of a question, and——

Senator SPECTER. I am going to move on—go ahead.

Judge SOTOMAYOR. And the Court has considered in other cases the number of times the issue has arisen and what actions the Court has or not taken with respect to that.

Roe is—*Casey* did reaffirm the core holding of Roe, and so my understanding would be that the issue would be addressed in light of *Casey* on the stare decisis——

Senator SPECTER. Do I hear you saying there would be at least a little bit of—let me move on. Let me move on to another separation of powers argument, and, that is, between Congress and the Court.

In 1997, in the case called *Boerne*, suddenly the Supreme Court of the United States found a new test called "congruence and proportionality." Up to that time, Judge Harlan's judgment on a rational basis for what Congress would decide would be sufficient. And here for the benefit of our television audience, we are talking about a record that the Congress maintains.

Take the Americans with Disabilities Act, for example, where there was a task force of field hearings in every State attended by more than 30,000 people, including thousands who had experienced discrimination with roughly 300 examples of discrimination by State governments. Notwithstanding that vast record, the Supreme Court of the United States in *Alabama* v. *Garrett* found Title I of the Americans with Disabilities Act unconstitutional.

The other title, Title II, of the Americans with Disabilities Act in *Tennessee* v. *Lane*, the Court found it constitutional on the same record.

Justice Scalia in dissent said that it was a "flabby test," that it was an "invitation to judicial arbitrariness and policy-driven decision making."

In a second round, if we have time, I will ask you—to give you some advance notice, although I wrote you about these cases—if you can find a distinction on the Supreme Court's determination. But my question to you is: Looking at this brand-new standard of proportionality and congruence, for whatever those words mean—and if we have time in the second round, I will ask you to define them, but there are other questions I want to come to. Do you agree with Justice Scalia that it is a flabby test and that, with having such a vague standard, the Court can do anything it wants and really engages in policy-driven decision making? Which means the Court, in effect, legislates.

Judge SOTOMAYOR. Senator, the question of whether I agree with a view of a particular Justice or not is not something that I can say in terms of the next case. In the next case that the Court will look at and a challenge to a particular congressional statute——

Senator SPECTER. Well, not the next case. This case. You have these two cases. They have the same factual record. And the Supreme Court, in effect, legislates, tells us what is right and what is wrong on this standard that nobody can understand.

Judge SOTOMAYOR. As I understand the congruence and proportionality test, it is the Supreme Court's holding on that test, as I

understand it, that there is an obligation on the Court to ensure that Congress is working—working—is legislating within its legislative powers.

The issue is not—and these are Section 5 cases, essentially, which are the clause of the Constitution under the 14th Amendment that permits Congress to legislate issues involving violations of the 14th amendment. The Court in those cases has not said that Congress can't legislate. What it has looked at is the form of remedy Congress can order and what it——

Senator SPECTER. But it doesn't tell us how to—let me move on to a Voting Rights Act case, and just pose the case, and I will ask you about it in the next round.

When Chief Justice Roberts testified at his confirmation hearings, he was very deferential to the Congress—not so, I might add, when he heard arguments in the voting rights case, but when he appeared here 3 years ago. He said this, and it is worth reading: "I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record. . . . As a judge . . . you may have the beginning to transgress into the area of making a law is when you are in a position of re-evaluating legislative findings because that doesn't look like a judicial function."

Now, that is about as deferential as you can be when you are nominee. But when Chief Justice Roberts presided over the voting rights case, he sound very, very different.

My question to you is: Do you agree with what Chief Justice Roberts said when he was just Judge Roberts that it is an area of making laws to transgress into what Congress has done by way of finding the facts?

Judge SOTOMAYOR. I would find it difficult to agree with someone else's words. I can tell you how much I understand the deference that Congress is owed, and I can point you at least to two cases—and there are many, many more—that shows how much I value the fact that we are courts that must give deference to Congress in the fields that are within its constitutional power.

Senator SPECTER. Well, do you agree with Chief Justice Roberts—I sent you that quotation a long time ago and told you I would ask you about it. Do you agree with him or not?

Judge SOTOMAYOR. I agree to the extent that one's talking about the deference that Congress is owed. I can't speak for what he intended to say by that. I can speak to what I——

Senator SPECTER. Well, not what he intended to say. What he did say.

Judge SOTOMAYOR. I heard what he said, sir, but I don't know what he intended in that description. I do know what I can say, which is that I do understand the importance to Congress' factual findings, that my cases and my approach in my cases reflect that. I've had any number of cases where the question was deference to congressional findings, and I have upheld statutes because of that deference.

Senator SPECTER. Is there anything the Senate or Congress can do if a nominee says one thing seated at that table and does something exactly the opposite once they walk across the street?

Judge SOTOMAYOR. That, in fact, is one of the beauties of our constitutional system, which is we do have a separation of——

Senator SPECTER. Beauty is in the eyes of the beholder. It is only Constitution Avenue there.

[Laughter.]

Judge SOTOMAYOR. Well, the only advantage you have in my case is that I have a 17-year record that I think demonstrates how I approach the law and the deference with which—or the deference I give to the other branches of Government.

Senator SPECTER. I think your record is exemplary, Judge Sotomayor. Exemplary. I am not commenting about your answers, but your record is exemplary.

[Laughter.]

Senator SPECTER. And you will be judged more on your record than on your answers, Judge Sotomayor.

For those who are uninitiated, your preparation appropriately is very careful. They call them "murder boards" at the White House. I don't know what you did and I am not asking. We have had a lot of commentary. And you studied the questions, and you have studied the record, and your qualification as a witness is terrific in accordance with the precedents there. You are following the precedents there very closely.

Let me move to television and the courts, and it is a question that many of us are interested in. I always ask it. I have introduced legislation twice, come out of Committee twice, to require the Court to televise. The Court does not have to listen to Congress. The Court can say separation of powers precludes our saying anything. But the Congress does have administrative procedural jurisdiction. We decide the Court convenes the first Monday in October. We decide there are nine Justices. We tried to make it 15 once in the Court-packing era, six Justices for a quorum, *et cetera*; the Speedy Trial Act telling the courts how they have to move at a certain speed, habeas corpus on time limits.

Justice Stevens has said that it is worth a try. Justice Ginsburg at one time said that if it was gavel to gavel, it would be fine. Justice Kennedy said it was inevitable.

The record of the Justices appearing on television is extensive. Chief Justice Roberts and Justice Stevens were on Prime time ABC, Justice Ginsburg on CBS, Justice Breyer on Fox News and so forth down the line.

We all know that the Senate and the House are televised, and we all know the tremendous, tremendous interest in your nominating process, and it happens all the time. There is a lot of public interest. But the Court is the least accountable. In fact, you might say the Court is unaccountable.

When *Bush* v. *Gore* was decided, then-Senator Biden and I wrote to Chief Justice Rehnquist asking that television be permitted and got back a prompt answer: "No." And that was quite a scene across the street. The television trucks were just enormous, all over the place. You had to be the Chairman of the Committee to get a seat inside the chamber.

The Supreme Court decides all the cutting-edge questions of the day: the right of a woman to choose abortion, the death penalty, organized crime—every cutting-edge question. And *Bush* v. *Gore* was one of the biggest cases—arguably, the biggest case. More than 100 million people voted in that election, and the Presidency was decided by one vote.

And Justice Scalia had this to say about irreparable harm: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to"—referring to President Bush, or Candidate Bush—"and to the country, by casting a cloud upon what he claims to be the legitimacy of the election. . . .[P]ermitting the Court to proceed on that erroneous basis will prevent an accurate recount from being conducted on a proper basis later."

It is hard to understand what recount there was going to be later. I wrote about it at the time saying that I thought it was an atrocious accounting of irreparable harm, hard to calculate that. And my question, Judge Sotomayor: Shouldn't the American people have access to what is happening in the Supreme Court to try to understand it, to have access to what the judges do by way of their workload, by way of their activities when they adjourn in June and reconvene in October, this year in September? Wouldn't it be more appropriate in a democracy to let the people take a look inside the Court through television?

The Supreme Court said in the *Richmond Newspapers* case decades ago that it wasn't just the accused that had a right to a public trial; it was the press and the public as well. And now it is more than newspapers. Television is really paramount. Why not televise the Court?

Judge SOTOMAYOR. As you know, when there have been options for me to participate in cameras in the courtroom, I have. And as I said to you when we met, Senator, I will certainly relay those positive experiences, if I become fortunate enough to be there to discuss it with my colleagues. And that question is an important one, obviously. There is legislation being considered both by—or has been considered by Congress at various times, and there is much discussion between the branches on that issue.

It is an ongoing dialog. It is important to remember that the Court because of this issue has over time made public the transcripts of its hearing quicker and quicker, if I am accurate, now. It used to take a long time for them to make those transcripts available, and now they do it before the end of the day.

It is an ongoing process of discussion.

Senator SPECTER. Thank you, Judge Sotomayor.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Specter.

And last in this round of questioning will be Senator Franken, the newest member of the Committee. Senator, I didn't officially welcome you the other day as I should have when we have new members, but welcome to the Committee. I offer you congratulations and condolences at the same time to come in on one of the——

Senator FRANKEN. I will take the congratulations.

Chairman LEAHY. Okay. Well, then was most heartfelt. I am glad you are here. Please go ahead.

Senator FRANKEN. Thank you, Mr. Chairman, and thank you, Judge Sotomayor, for sitting here so patiently and for all your thoughtful answers throughout the hearing.

Before lunch, our senior Senator from Minnesota, Amy Klobuchar, asked you why you became a prosecutor, and you mentioned "Perry Mason." I was a big fan of "Perry Mason." I watched "Perry Mason" every week with my dad and my mom and my brother. And we would watch the clock, and we knew when it was 2 minutes to the half-hour that the real murderer would stand up and confess.

[Laughter.]

Senator FRANKEN. It was a great show. And it amazes me that you want to become a prosecutor based on that show, because in "Perry Mason," the prosecutor—Burger—lost every week.

[Laughter.]

Senator FRANKEN. With one exception, which we will get to later. But I think that says something about your determination to defy the odds. And while you were watching "Perry Mason" in the South Bronx with your mom and your brother, I was watching "Perry Mason" in suburban Minneapolis with my folks and my brother, and here we are today. And I am asking you questions because you have been nominated to a Justice of the United States Supreme Court. I think that is pretty cool.

As I said in my opening statement, I see these proceedings both as a way to take a judgment of you and of any nominee's suitability for the high Court, but also as a way for Americans to learn about the Court and its impact on their lives. Right now, people are getting more and more of their information on the Internet, getting newspapers and television and blogs and radio. Americans are getting all of it online, and it plays a central role in our democracy by allowing anyone with a computer connected to the Internet to publish their ideas, their thoughts, their opinions, and reach a worldwide audience of hundreds of millions of people in seconds. This is free speech, and this is essential to our democracy, and to democracy, we saw this in Iran not long ago.

Now, Judge, you are familiar with the Supreme Court's 2005 *Brand X* decision, are you?

Judge SOTOMAYOR. I am.

Senator FRANKEN. Okay. Well, then you know that Brand X deregulated Internet access services, allowing service providers to act as gatekeepers to the Internet, even though the Internet was originally Government funded and built on the notion of common carriage and openness. In fact, we have already seen examples of these companies blocking access to the Web and discriminating on certain uses of the Internet. This trend threatens to undermine the greatest engine of free speech and commerce since the printing press.

Let's say you are living in Duluth, Minnesota, and you only have one Internet service provider. It is a big mega corporation, and not only are they the only Internet service provider, but they are also a content provider. They own newspapers. They own TV networks or a network. They have a movie studio.

They decide to speed up their own content and slow down other content. The *Brand X* decision by the Supreme Court allows them to do this. And this is not just Duluth. It is Moorhead, Minnesota; it is Rochester, Minnesota; it is Youngstown, Ohio. It is Denver, it is San Francisco, and, yes, it is New York. This is frightening—frightening to me and to millions of my constituents or lots of my constituents.

Internet connections use public resources, the public airways, the public rights of way. Doesn't the American public have a compelling First Amendment interest in ensuring that this can't happen and that the Internet stays open and accessible—in other words, that the Internet stays the Internet?

Judge SOTOMAYOR. Many describe the telephone as a revolutionary invention, that changed our country dramatically. So did television. And its regulation of television and the rules that would apply to it were considered by Congress, and those regulations have—because Congress is the policy chooser on how items related to interstate commerce and communications operate. And that issue was reviewed by the courts in the context of the policy choices Congress made.

There is no question in my mind as a citizen that the Internet has revolutionized communications in the United States, and there is no question that access to that is a question that society—that our citizens as well as yourself are concerned about.

But the role of the court is never to make the policy. It is to wait until Congress acts and then determine what Congress has done and its constitutionality in light of that ruling.

Brand X, as I understood it, was a question of which Government agency would regulate those providers, and the Court, looking at Congress' legislation in these two areas, determined that it thought it fit in one box, not the other, one agency instead of another.

Senator FRANKEN. Is this Title I and Title II? Or as I understand it, Title II is subject to regulation and Title I isn't.

Judge SOTOMAYOR. Exactly, but the question was not so much stronger regulation or not stronger regulation. It was which set of regulations, given Congress' choice, controlled.

Obviously, Congress may think that the regulations the Court has in its holding interpreted Congress' intent and that Congress thinks the Court got it wrong. We are talking about statutory interpretation and Congress' ability to alter the Court's understanding by amending the statute if it chooses.

This is not to say that I minimize the concerns you express. Access to Internet, given its importance in everything today—most businesses depend on it. Most individuals find their information. The children in my life virtually live on it now. And so its importance implicates a lot of different questions—freedom of speech, freedom with respect to property rights, Government regulation. There's just so many issues that get implicated by the Internet that what the Court can do is not choose the policy. It just has to go by interpreting each statute and trying to figure out what Congress intends.

Senator FRANKEN. I understand that, but isn't there a compelling First Amendment right here for people? No matter what Congress does—and I would urge my colleagues to take this up and write

legislation that I would like. But isn't there a compelling, overriding First Amendment right here for Americans to have access to the Internet?

Judge SOTOMAYOR. Rights by a court are not looked at as overriding in the sense that I think a citizen—or a citizen would think about it, should this go first or should a competing right go second. Rights are rights, and what the Court looks at is how Congress balanced those rights in a particular situation and then judges whether that balance is within constitutional boundaries.

Calling one more compelling than the other suggests that they're sort of—you know, property interests are less important than First Amendment interests. That's not the comparison a court makes. The comparison the court makes starts with what balance does Congress choose first, and that we'll look at that if it—and see if it's constitutional.

Senator FRANKEN. Okay. So we have got some work to do on this.

Let me get into judicial activism. I brought this up in my opening statement. As I see it, there is kind of an impoverishment of our political discourse when it comes to the judiciary. I am talking in politics. When candidates or office holders talk about what kind of judge they want, it is very often just reduced to, "I don't want an activist judge. I don't want a judge that is going to legislate." And that is sort of it. That is it. It is a 30-second sound bite.

As I and a couple other Senators mentioned during our opening statements, judicial activism has become a codeword for judges that you just do not agree with.

Judge, what is your definition of "judicial activism"?

Judge SOTOMAYOR. It's not a term I use. I don't use the term because I don't describe the work that judges do in that way. I assume the good faith of judges in their approach to the law, which is that each one of us is attempting to interpret the law according to principles of statutory construction and other guiding legal principles, and to come in good faith to an outcome that we believe is directed by law. When I say "we believe," hopefully we all go through the process of reasoning it out and coming to a conclusion in accordance with the principles of law.

I think you are right that one of the problems with this process is that people think of activism as the wrong conclusion in light of policy. But hopefully judges—and I know that I don't approach judging in this way at all—are not imposing policy choices or their views of the world or their views of how things should be done. That would be judicial activism in my sense if a judge was doing something improper like that.

But I don't use that word because that's something different than what I consider to be the process of judging, which is each judge coming to each situation trying to figure out what the law means, applying it to the particular fact before that judge.

Senator FRANKEN. Okay. You don't use that word or that phrase. But in political discourse about the role of the judiciary, that is almost the only phrase that is ever used. And I think that there has been an ominous increase in what I consider judicial activism of late, and I want to ask you about a few cases and see if you can shed some light on this for us and for the people watching at home or in the office.

I want to talk about *Northwest Austin Utility District Number One* v. *Holder*, the recent Voting Rights Act, and Senator Cardin mentioned it, but he did not get out his pocket Constitution, as I am.

The 15th Amendment was passed after the Civil War and specifically gave Congress the authority to pass laws to protect all citizens' right to vote, and it said, Section 1—Amendment XV, Section 1, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2, and this one is important: "The Congress shall have power to enforce this article by appropriate legislation." The Congress.

Well, Congress used that power, the power vested in it under Section 2, when it passed the Voting Rights Act of 1965. Now, the Voting Rights Act has a specially strong provision, Section 5, that requires States with a history of discrimination to get preapproval from the Justice Department on any changes that they make in their voting regulations. Congress has reauthorized this four times, as recently as—the last time was 2006, and the Senate supported it by a vote of 98–0. Every single Senator from a State covered by Section 5 voted to reauthorize it.

So now it is 2009, and we have this case, the Northwest Austin Utility District Number One, and Justice Thomas votes to hold Section 5 unconstitutional. He said it went beyond the mandate of the 15th Amendment because it wasn't necessary anymore. That is what he said.

Now, when I read the 15th Amendment, it does not contain any limits on Congress' power. It just says that we have it. It does not say, "If necessary, the Congress shall have power to enforce this article." It just says that we have the power.

So it is my understanding that the 15th Amendment contains a very strong, very explicit and unambiguous grant of power to the Congress, and because of that the courts should pay greater deference to it. And my question is: Is that your view?

Judge SOTOMAYOR. As you know, some of the Justices in that recent decision expressed the view that the Court should take up the constitutionality of the Voting Rights Act and review its continuing necessity. Justice Thomas expressed his view. That very question, given the decision and the fact that it left that issue open, is a very clear indication that that's a question that the courts are going to be addressing, if not immediately the Supreme Court, certainly the lower courts. And so expressing a view, agreeing with one person in that decision or another, would suggest that I have made a prejudgment on this question. I consider——

Senator FRANKEN. So that means you are not going to tell us.

[Laughter.]

Senator FRANKEN. I didn't mean to finish your sentence. I think that is where you are going.

Judge SOTOMAYOR. All I can say to you is—I have one decision among many, but one decision on the Voting Rights Act, and not the recent reauthorization by Congress, but a prior amendment where I suggested that these issues needed—issues of changes in

the Voting Rights Act should be left to Congress in the first instance.

My jurisprudence shows the degree to which I give deference to Congress' findings. Whether in a particular situation that compels or doesn't or leads to a particular result is not something that I can opine on, because particularly the issue you are addressing right now is likely to be considered by the courts. The ABA rule says no judge should make comments on the merits of any pending or impending case, and this clearly would be an impending case.

Senator FRANKEN. Okay. It is fair to say, though, in your own decisions you gave deference to Congress, just like you answered my neutrality saying it is up to Congress, it feels like this is very explicitly up to Congress.

Judge SOTOMAYOR. I gave deference to the exact language that Congress had used in the Voting Rights Act and how it applied to a challenge in that case.

Senator FRANKEN. Okay. Now, voting to overturn Federal legislation, to me at least, seems to be one definition of what people understand as judicial activism. But I want to talk about some cases that I have seen that I think show judicial activism functioning on a more pernicious level.

First, let's take a look at a case called *Gross* v. *FBL Financial Services* that the Supreme Court issued last month. Are you familiar with that?

Judge SOTOMAYOR. I am.

Senator FRANKEN. Now, Gross involved the Age Discrimination in Employment Act, or ADEA. Before Gross, you could bring an age discrimination suit whenever you could show that age was one of the factors an employer considered in choosing to fire you. When the Supreme Court agreed to hear the case, it said it would consider just one question: whether you needed direct evidence of age discrimination to bring this kind of lawsuit or whether indirect evidence would suffice. That is the issue that they said that they would consider when they took the case.

But when the Supreme Court handed down its decision, it ruled on a much larger matter: whether a worker could bring a suit under ADEA if age was only one of several reasons for being demoted or fired. The Supreme Court barred these suits saying that only suits alleging that age was the determinative factor for the firing, only those could be brought under the ADEA.

This change has significantly eroded workers' rights by making it much harder for workers to defend themselves from age discrimination, including getting fired just before they were to have seen a large increase in their pension. You were not fired because you are too old; you are fired because your pension is going to increase soon. So this is a big deal.

When you go to court to defend your rights, you have to know what rights you are defending. The parties in the *Gross* case thought they were talking about what kind of evidence was necessary in a decision suit. Then the Court said, "No, we are banning that kind of suit altogether."

I think that is unfair to everyone involved. It is especially unfair to the man who is trying to bring the discrimination suit. So let me ask you a couple of questions on this.

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First, as an appellate court judge, how often have you decided a case on an argument or a question that the parties have not briefed?

Judge SOTOMAYOR. I don't think I have, because to the extent that the parties have not raised an issue and the circuit court for some reason the panel has thought that it was pertinent—most often that happens on questions of jurisdiction. Can the Court hear this case at all? Then you issue—or we have issued a direction to the parties to brief that question, so it is briefed and part of the argument that is raised.

There are issues that the parties brief that the briefing itself raises the issue for the Court to consider. So it is generally the practice, at least on the Second Circuit, to give a party an opportunity to be heard on a question. And we also have a procedure on the circuit that would give a party to be heard because they can also file the petition for rehearing, which is the panel enters a decision that the party disagrees with and thinks the court has not given it an adequate opportunity to present its arguments. Then it can file that at the circuit.

I don't have—I am familiar with the *Northwest* case. I am familiar with the holding of that case. I am a little less familiar and didn't pay as much attention——

Senator FRANKEN. With Gross.

Judge SOTOMAYOR [continuing]. To the briefing issue. I do know there that, like the *Brand X* case, what the Court says it was attempting to do is to discern what Congress' intent was under the ADEA, whether it intended to consider mixed motive or not as a factor in applying the statute. And the majority holding, as I understood it, was, look, Congress amended Title VII to set forth the mixed motive framework and directed the courts to apply that framework in the future. But having amended that, it didn't apply that amendment to the age discrimination statute. And so that would end up in a similar situation to the *Brand X* case, which is to the extent that that Congress determines that it does want mixed motive to be a part of that analysis, that it would have the opportunity and does have the opportunity to do what it did in Title VII, which is to amend the act.

Senator FRANKEN. In Title VII, they amended the act because they had to, they were forced to. Right? Congress was compelled to, in a sense, but not on ADEA.

Judge SOTOMAYOR. I don't like characterizing the reasons for why Congress acts or doesn't act.

Senator FRANKEN. Okay. Let me jump ahead to something. Yesterday a member of this Committee asked you a few times whether the word "abortion" appears in the Constitution, and you agreed that, no, the word "abortion" is not in the Constitution. Are the words "birth control" in the Constitution?

Judge SOTOMAYOR. No, sir.

Senator FRANKEN. Are you sure?

Judge SOTOMAYOR. Yes.

[Laughter.]

Senator FRANKEN. Okay. Are the words "privacy" in the Constitution? Or the word.

Judge SOTOMAYOR. The word "privacy" is not.

Senator FRANKEN. Senators Kohl, Feinstein, and Cardin all raised the issue of privacy, but I want to hit this head on. Do you believe that the Constitution contains a fundamental right to privacy?

Judge SOTOMAYOR. It contains, as has been recognized by the courts for over 90 years, certain rights under the liberty provision of the Due Process Clause, that extend to the right to privacy in certain situations. This line of cases started with a recognition that parents have a right to direct the education of their children and that the State could not force parents to send their children to public schools or to bar their children from being educated in ways a State found objectionable. Obviously, States do regulate the content of education, at least in terms of requiring certain things with respect to education that I don't think the Supreme Court has considered. But that basic right to privacy has been recognized and was recognized. And there have been other decisions.

Senator FRANKEN. So the issue of whether the word actually appears in the Constitution is not really relevant, is it?

Judge SOTOMAYOR. Certainly there are some very specific words in the Constitution that have to be given direct application. There are some direct commands by the Constitution. You know, Senators have to be a certain age to be Senators, and so you got to do what those words say. But the Constitution is written in broad terms, and what a court does is then look at how those terms apply to a particular factual setting before it.

Senator FRANKEN. Okay. In *Roe* v. *Wade*, the Supreme Court found that the fundamental right to privacy included the right to decide whether or not to have an abortion. And as Senator Specter said, that has been upheld or ruled on many times.

Do you believe that this right to privacy includes the right to have an abortion?

Judge SOTOMAYOR. The Court has said in many cases—and as I think has been repeated in the Court's jurisprudence in *Casey*—that there is a right to privacy that women have with respect to the termination of their pregnancies in certain situations.

Senator FRANKEN. Okay. We are going to have a round two, so I will ask you some more questions there.

What was the one case in "Perry Mason" that Burger won?

[Laughter.]

Judge SOTOMAYOR. I wish I remember the name of the episode, but I don't. I just was always struck that there was only one case where his client was actually guilty and——

Senator FRANKEN. And you don't remember that case?

Judge SOTOMAYOR. I know that I should remember the name of it, but I haven't looked at the episode——

Senator FRANKEN. Didn't the White House prepare you for——

[Laughter.]

Judge SOTOMAYOR. You're right, but I was spending a lot of time on reviewing cases. But I do have that stark memory because, like you, I watched it all of the time, every week as well. I just couldn't interest my mother the nurse and my brother the doctor to do it with me.

Senator FRANKEN. Oh, Okay. Well, our whole family watched it, and because there was no Internet at the time, you and I were

watching at the same time. And I thank you, and I guess I will talk to you in the follow-up.

Judge SOTOMAYOR. Thank you.

Chairman LEAHY. Is the Senator from Minnesota going to tell us which episode that was?

Senator FRANKEN. I don't know. That is why I was asking.

[Laughter.]

Senator FRANKEN. If I knew, I wouldn't have asked her.

Chairman LEAHY. All right. So because of that, Judge, we will not hold your inability to answer the question against you.

I just discussed this with Senator Sessions, but I will make the formal request. Is there any objection that the Committee now proceed to a closed session, which is a routine practice we have followed for every nominee since back when Senator Biden was Chairman of this Committee?

Senator SESSIONS. Mr. Chairman, thank you. I think that is the right thing to do, and there will be no objection that I know of.

Chairman LEAHY. Thank you very much. I appreciate the comment, and so hearing none, the Committee will proceed to a closed session, and we will resume public hearings later this afternoon. And for the sake of those who have to handle all electronic kinds of things, we will try to give you enough of a heads-up.

We will stand in recess.

[Whereupon, at 3:07 p.m., the hearing was recessed for a closed session.]

After Recess [3:37 p.m.]

Chairman LEAHY. Judge, why don't we try it again? We'll use—all right. This is not working either?

Senator SESSIONS. You've got a chance to be on history here.

Chairman LEAHY. Back to what is——

Senator SESSIONS. That's the quickest ride of any Senator in history.

[Laughter.]

Chairman LEAHY. Back to what it——

Senator FRANKEN. I shouldn't do this.

[Laughter.]

Chairman LEAHY. No, no. Stay right there.

Back to what Dr. Branda said. He wrote about Judge Sotomayor, that "she reflects, via her career on the bench, the type of tempered restraint and moderation necessary for appropriate application of the rule of law, and without a doubt, Judge Sotomayor serves with a moderate voice without displays of bias toward any party based on affiliation, background, sex, color, or religion." The letter concludes, "Even moderate and conservative evangelicals within our ranks find no reason to conclude that the nomination and confirmation of Judge Sonia Sotomayor would diminish the collective application of constitutional rights and freedoms to a religious community committed to life, liberty, and the pursuit of happiness", and goes on to urge us to confirm you.

Second, the Committee has received a joint letter of support for Judge Sotomayor's nomination from more than 1,200 law professors from all States—all 50 States and the District of Columbia, as well as from the Society of American Law Teachers.

And they write, "Her opinions reflect careful attention to the facts of each case and a reading of the law that demonstrates fidelity to the types of statutes and the Constitution. She plays close attention to precedent. She has proper respect for the role of courts and other branches of government in our society." And the Society of American Law Teachers writes, "Far from being an activist judge," you, Judge Sotomayor, "decide cases on the basis of her understanding of the law and applicable legal principles."

I'm going to put that—those letters in the record.

[The letters appear as a submission for the record.]

Chairman LEAHY. And now I will try one more time to see if the microphone will work before my friends in the press get too——

Senator SESSIONS. Well, Mr. Chairman, could I—I believe you were not on the clock then, is that right? So I would like to offer a few documents for the record, if that would be all right.

Chairman LEAHY. Go ahead.

Senator SESSIONS. I'd offer a letter from Club for Growth, raising serious concern about the *Didden* v. *Village of Port Chester* condemnation case where the Judge approved the taking of a property that was going to have one drugstore built on it and so another company could build on it. The Family Research Council, the letter raising serious concerns, and without more, they must stand in opposition to the nomination. The Concerned Women of America write in opposition to this nomination. I'd offer that into the record.

The American Center for Law and Justice, expressing concerns about the nomination. The Americans United For Life have written about the nomination, as well as the Gun Owners of America. I would just offer those for the record at this time, Mr. Chairman.

Chairman LEAHY. Without objection, they will be included in the record. That time will not count against either Senator Sessions or myself.

[The letters appear as a submission for the record.]

Chairman LEAHY. Now, on the clock.

Judge, one need look no further than the *Lilly Ledbetter* case or the *Diana Levine* case, a woman from Vermont, to understand the impact each Supreme Court case has on the lives and freedoms of countless Americans. In *Lilly Ledbetter's* case, five Justices on the Supreme Court struck a severe blow to the rights of working families across our country and required the Congress to pass legislation basically overruling the Supreme Court case to say, yes, women should be paid the same as men.

Justice Ginsburg's dissent in that case criticized the narrow majority for making a cramped interpretation of our civil rights law.

In a different context, you sat on a three-judge panel in a case involving strip searches of girls in a juvenile detention center. The parents of two girls challenged a policy of strip searching all those admitted to juvenile detention centers as a violation of the Fourth Amendment's prohibition against unreasonable searches; two of your male colleagues upheld that search.

In a dissent, you said a controlling Circuit precedent described what is involved in strip searches of these girls without individual suspicion, who'd never been charged with a crime, and warned that courts should be especially wary of strip searches of children, since youth is a time and condition of life when a person may be most

susceptible to influence and to psychological damage. As a parent and a grandparent, I agree with you.

You also emphasized that many of these girls had been victims of abuse and neglect and may be more vulnerable mentally and emotionally than other youths their age.

The Supreme Court recently considered a similar case involving an intrusive strip search of young Savanna Redding because of school officials looking for ibuprofen tablets. During oral argument in that case, one of the male Justices compared the girl's strip search to changing for gym class. Several of the other Justices' reaction was simply laughter.

Justice Ginsburg, the sole female Justice on the court, described the search as humiliating, something that most parents realize. Justice Souter, writing for the court, concluded that school officials violated the Fourth Amendment rights of Savanna Redding, adopted Justice Ginsburg's position and reasoning.

I believe these cases underscore the need for diversity. They underscore having judges with different life experiences on the Federal bench, including the Supreme Court. It's been said several times here, citing cases doesn't just take a computer, otherwise we don't need real people. It does need real-life experiences. You are a role model and a mentor to many young people. We've heard that in all kinds of letters and statements.

How do you think it affects these young people to see only one woman on the Supreme Court today? How would it affect the confidence in the judicial system of litigants like young Savanna Redding?

Judge SOTOMAYOR. Senator, I think that it's one of the reasons that every President in the last two—or say 20 years, 25 years, has attempted to promote diversity on a basic understanding that our society is enriched by its confidence that our legal system is—includes all members of society. I know that Justice Ginsburg has spoken about the fact of how much she misses Justice O'Connor, and not because she does not have a good relationship with her colleagues.

I understand that she and Justice Scalia have a very, very close friendship and attend the opera together and travel together, so it's not a question, I don't think, of whether there's any question about the importance of the confidence that Americans have in our system because they see that everyone's represented as a part of our legal system, both as judges, as lawyers, as participants on every level of our work.

Chairman LEAHY. When John Roberts, now Chief Justice Roberts, was before the Committee I asked him about a precedent that moved me a great deal: *Gideon* v. *Wainwright.* I thought about it later when I was a young lawyer being assigned to defend cases, and later when I was a prosecutor, prosecuting cases. As a young law student, I had an opportunity—in fact, my wife and I had an opportunity. I was at Georgetown Law School. We had lunch with Hugo Black shortly after getting reversed in *Wainwright*. It's one of the most memorable times I had in my law school career.

Now, Hugo Black went on there as a former Senator and he recognized the Constitution's guarantee to counsel in a criminal case was a fundamental right to a fair trial. He called it an "obvious

truth in an adversary system of criminal justice. Any person hauled into court who is too poor to hire a lawyer can't have a fair trial unless counsel is provided for them."

There's a wonderful book, Gideon's Trumpet, that Anthony Lewis wrote. I still have that book. I still have it. I can almost recite, word for word, that book.

So I'm going to ask you exactly the same question I asked then-Judge Roberts: doesn't Gideon stand for the principle that to be meaningful, such a fundamental right as the right to counsel requires assurances that can be exercised?

Judge SOTOMAYOR. That is a part of the holding of Gideon. It has been reaffirmed in terms of the right to counsel, not only the right to counsel and the representation of criminal issues, but the court has recognized that right with respect to a competent counsel, the question of whether incompetent counsel has caused the defendant damage as assessed under a legal standard. But the question is, the right to counsel was the core holding of Gideon.

Chairman LEAHY. If the Constitution guarantees a person the ability to exercise a certain fundamental constitutional right, whatever it might be, and if they say—the court says they're guaranteed that right, these rights are only meaningful if an American can then enforce those rights in a court. Is that not correct?

Judge SOTOMAYOR. Their rights are meaningful and they are rights that we work at ensuring are given meaning in the courts. I know for a fact that one of the activities—I know for a fact. I know, because I lived it. When I became a judge on the Second Circuit I was given responsibility for the Second Circuit's Committee on the Criminal Judge Act and Pro Bono Service. Generally, that—the chair of the committee is the most recent addition to the court, and immediately upon the confirmation of another judge, that judge takes over the chairpersonship.

I, because of my belief in the meaningfulness of representation and its importance to the justice system, have held that position probably for the longest judge in the Second Circuit. With the agreement of judges who came after me, I served as the chair of that committee. I don't know—remember exactly the number of years, but it was certainly a very long period of time, and I worked very hard to improve both the processes of selection of Criminal Justice Act attorneys—those are the attorneys that represent indigent defendants in criminal actions—and to ensure that there was adequate review of their qualifications and regular review of their performance.

Chairman LEAHY. I don't want to put words in your mouth, but is it safe to say that if you have a constitutional right, as a practical effect, that only works if you can enforce that constitutional right?

Judge SOTOMAYOR. Clearly, that's—in terms of the—it's given meaning through actions, and actions by the legislature, who have provided funds for the retention of qualified counsel, and the court's obligation to ensure that that right is meaningful in practice.

Chairman LEAHY. Thank you. I've used just barely over half my time. I'll reserve time.

Senator SESSIONS. And hope that sets an example.

Senator SESSIONS. I'm impressed, Mr. Chairman. Thank you.

You know, we talked a little earlier about judicial activism. Senator—our new Senator raised that. We have a good definition. Our former chairman, Senator Hatch. He's given us a definition for a number of years, and that is when a judge allows their personal, political, or other biases to overcome their commitment to the rule of law. That's not as well as he said it, but that's pretty close.

Senator HATCH. That's better than I said it.

Senator SESSIONS. But I think that's—and you can have, Senator Franken, a liberal or conservative activist judge, and judges need to be watched, as we all do, to make sure that they stay faithful to the law.

I really believe in this legal system. I think it's so fabulous. I've traveled the world with the Armed Services Committee and I see these countries and it just breaks your heart. You think you can go in and write a code of law and they can make it work, and it's just—you can write them all day, but it—making it actually be real in every village, hamlet, and farm, and city in these countries is so, so hard. We are so blessed.

So I just want to say, Judge, I appreciate you and look forward to questioning. But I—I just—my approach is to try to do the best thing we can for America in this fabulous system we've got.

We've—I think our side is committed to being fair throughout this hearing, and trying to be thoughtful in our questions. Nobody's perfect, but I think everybody's done a pretty good job at that.

Now, I've listened to your testimony carefully, looked at some transcripts, and I have to say, I'm still concerned about some of the issues that have been raised. You're seeking a lifetime appointment. This is the one chance we have to ask those questions and we must do that.

With regard to the "wise Latina" quote where you said that they—they should make decisions that are better than a white male, you—and the question of Senator—Justice O'Connor's comment about a, wise old woman and a wise old man should—would reach the same conclusion.

I would just say there's a difference. Both may well be a rhetorical flourish or rhetorical approach to stating a truth, but I think Justice O'Connor's approach, in truth, was that judges, under the American ideal, should reach the same decision if—if they can put aside all their biases and prejudices. And you seem to say in your approach, and throughout that speech, that backgrounds, sympathies and prejudices can impact how you rule, and you could expect a different outcome.

How would you respond to that?

Judge SOTOMAYOR. Senator, I want to give you complete assurance that I agree with Senator Hatch on his decision—his definition of activism. If that's his definition, that judges should not be using their personal biases, their personal experiences, their personal prejudices in reaching decision and that's how he defines activism, then I'm in full agreement with him.

To the extent that my words have led some to believe that I think a particular group has—has—is better than another in reaching a decision based on their experiences, my rhetorical device failed. It failed because it left an impression that I believe some-

thing that I don't. And as I have indicated, it was a bad choice of words by me in—because it left an impression that has offended people and has left an impression that I didn't intend. As I indicated earlier, I——

Senator SESSIONS. But did it not—could I just briefly interrupt? Did it not suggest that your approach to the question of objectivity and commitment to it was different than Justice O'Connor's? Didn't you cite it in—in opposition to her view?

Judge SOTOMAYOR. As I—I can explain it, is I didn't understand her to mean that she thought that if two judges reached a different conclusion, that one of them was unwise because judges disagree as to conclusions. And I know that there's an aspiration that the law would be so certain that that would never happen, but it's not that certain. Laws are not written clearly, on occasion, by Congress. Courts apply principles of construction that suggest an approach to a particular set of facts that might differ. All of that doesn't make one or the other judge wise. So——

Senator SESSIONS. I would agree with that. And I—I think one judge—you can have honest disagreements. I think that she was expressing the ideal that if everybody were perfectly wise, they may reach the same decision.

With regard to the Second Amendment, this is a hugely important issue. Isn't it true, Judge, that the decision that you and your panel rendered, if it were to be the law of the United States and if it is not reversed by the U.S. Supreme Court, would say that the Second Amendment is subject to—is not—the Second Amendment does not protect the right of the people to keep and bear arms in any city, county, and State in America. That is that New York, or Atlanta, or Philadelphia, or Houston, Los Angeles, or any State in between could pass a law that barred firearms within those States, and isn't this a really big issue right now for the United States Supreme Court coming up soon?

Judge SOTOMAYOR. It may well come up. And I'm not familiar enough with the regulations in all 50 States to know whether there's an absolute prohibition in any one city or State against the possession of firearms. All I can speak about is that, as in the case the panel looked at, the question for the court would not be whether the government action in isolation is constitutional or not. The question—in isolation. It would be, what's the nature of the government interest in the statute it's passing? And depending on the——

Senator SESSIONS. That's the rational basis test?

Judge SOTOMAYOR. Exactly. And so——

Senator SESSIONS. Well, but the rational basis test could very well be fairly interpreted to say that since guns kill people, it's rational for a city to vote to eliminate all guns.

I would just say to you, isn't it true that if a city could pass that very low test they could ban firearms if your decision is not reversed by the Supreme Court?

Judge SOTOMAYOR. Because that question of incorporation before the court will arise, I don't feel that I can comment on the merits of the hypothetical. All I can say is, regardless of what standard of review the court uses, it has struck down regulations under every standard of review used, whether it's rational basis, or in

some instances strict scrutiny, et cetera. There is the constitutional——

Senator SESSIONS. Judge, I would just say that you held, following some law in the 1800's—you held, though, that the Second Amendment does not apply to the States, even though it uses the words "the right of the people to keep and bear arms shall not be infringed". So I'm—I think we have a—this is a big issue and I—in your opinion, you said it was settled law.

You used some very strong language. You said it was not "a fundamental right", and you said that in your testimony earlier, that "in Supreme Court parlance, the right is not fundamental." You said that, I believe, to Senator Leahy in this hearing. So I guess my question is, have you made up your mind such that if you were on the Supreme Court and it was not your case that came up—and it could be your case—don't you feel that you should recuse yourself since you've already opined on this fundamental issue?

Judge SOTOMAYOR. I have not prejudged the question that the Supreme Court left open in *Heller*, and the question the court left open itself was, should it reexamine the issue of whether this right should be incorporated against the States or not? It didn't, in large measure, because the issue before the court at that moment was the right with respect to Federal Government regulation.

I have not made up my mind. I didn't say that I believed it wasn't fundamental or that I hold a view that it's not. I don't hold a view about whether it should be incorporated or not. The issue before me and the panel in *Maloney* was whether the Supreme Court had said that and what Second Circuit had said about that issue.

Senator SESSIONS. Has any other Circuit said it was not a fundamental right, other than your—your panel's decision?

Judge SOTOMAYOR. There is one Circuit, the Seventh Circuit, in a decision written by Judge Easterbrook, who came to the same conclusion.

Senator SESSIONS. Did he say—did he say it was not a fundamental right, though, in that opinion? I don't believe they did.

Judge SOTOMAYOR. He may not have because——

Senator SESSIONS. And that was a question—my question I was asking. So it's a problem for people. We ask about abortion. It's not explicitly referred to in the Constitution, but you say that's a fundamental right. And we have in the Constitution language that says "the right of the people to keep and bear arms shall not be infringed", and there's a question about that, that it's not a fundamental right. So I think that's what makes people worry about our courts and our legal system today and whether agendas are being promoted through the law rather than just strictly following what the law says.

Judge SOTOMAYOR. Senator, may I——

Senator SESSIONS. Yes.

Judge SOTOMAYOR.—address my use of the word "fundamental"? Fundamental is a legal term that I didn't make up, it was the Supreme Court's term. And it used it in the context—and uses it in the context—of whether a particular constitutional provision binds the States or not. And so I wasn't using the word—I. The panel

wasn't using the word in *Maloney* in the sense of its ordinary meaning.

Senator SESSIONS. I know you were using the constitutional legal meaning, but that's hugely important because if it's not a fundamental right, it's not incorporated. Isn't that correct?

Judge SOTOMAYOR. Well——

Senator SESSIONS. And it will not apply to the States fundamentally. Isn't that the bottom line?

Judge SOTOMAYOR. Well, when the court looks at that issue it will decide, is it incorporated or not, and it will determine, by applying the test that it has subsequent to its old precedent, whether or not it is fundamental, and hence, incorporated. But the *Maloney* decision was not addressing the merits of that question, it was addressing what precedent said on that issue.

Senator SESSIONS. All right. Well, we'll review that.

On the question of foreign law, you, yesterday, said that—said this: "Unless the statute requires or directs you to look at foreign law," and some do—some statutes do, by the way. You go on to say, "The answer is no. Foreign law cannot be used as a holding, or a precedent, or to bind or influence the outcome of a legal decision interpreting the Constitution or American law." That's a pretty good statement, I think. But this is what you said before in your speech to the American Civil Liberties Union, actually in April, just two or 3 months ago in Puerto Rico.

You said this: "International law and foreign law will be very important in the discussion of how we think about unsettled issues in our own legal system. It is my hope that judges everywhere will continue to do this, because within the American legal system we're commanded to interpret our law in the best way we can, and that means looking to what other—anyone else has said to see if it has persuasive value." So that's troubling.

Now, you also said, yesterday, that you agreed with Justice Scalia and Justice Thomas on the point that one has to be very cautious, even in using foreign law with respect to things American law permits you to do. I don't think that's exactly correct or a fair summary of the import of your speech.

This is what you said before the ACLU group a month or two ago: "And that misunderstanding", about using foreign law, "is, unfortunately, endorsed by some of our Supreme Court Justices." Both—"unfortunately endorsed". Both Justice Scalia and Justice Thomas have written extensively, criticizing the use of foreign and international law in Supreme Court decisions. They have somewhat a valid point, and you point that out.

But then you go on to say, "But I think I share more the ideas of Justice Ginsburg and her thinking in believing that unless American courts are more open to discussing the ideas raised in foreign cases and by international cases, that we're going to lose influence in the world."

So everybody knows. There's been a fairly robust, roaring debate over this question. There are basically two sides, one led by Justice Ginsburg and one led by Justices Scalia and Thomas. Don't you think a fair reading of this statement is that you came down on the side of Justice Ginsburg?

Judge SOTOMAYOR. No, sir. Because these conversations were in the context—and discussions were in the context of my pointing out, just as she had, that foreign law can't be a holding, it can't be precedent, it can't be used in that way. She is talking about the way I was to—and what I said in my speech at the beginning and the end, ideas. What are you thinking about? Judges use Law Review articles, they use statements by other courts. The New York Court of Appeals, in a recent case, looked to foreign law to address an issue that it was considering, not in terms of a holding for the court, but a way of thinking about it that it would consider.

My point is that I wasn't advocating that it should ever serve as precedent or ever serve as a holding. I was talking about the dialog of ideas and——

Senator SESSIONS. Well, you know, we go—I just think that you laid out positions and you came down on one side, and I think that's a fair summary of that speech which other people—others can read and make up their own mind.

You ask about the PRLDF, the Legal Defense Fund of which you were a member and a member of the board for 12 years. And in response to Senator Graham's question, you say you've never seen any briefs and that the main focus of your work at the organization was fund raising. Is that accurate?

Judge SOTOMAYOR. When I was responding to the Senator I was talking about the board in general. I belonged to many committees, and so I did other things besides fund raising. But I was beginning to explain what the structure of the board was and what the primary responsibility of board members is. But clearly, board members serve other functions in an organization.

Senator SESSIONS. You did serve on the Litigation Committee, and boards are supposed to, I would think—and legally are required—to superintend the activities of the organization that they're a member of. And then you have committees of the board who do various things. I'm looking at a June 1987 document, reported minutes of the board, the Litigation Committee: "Sonia Sotomayor reported that the committee, in addition to reviewing and recommending a litigation program, had identified three initiatives."

In October 1987—I'm just looking at some of the documents we were given—litigation report. "Chairman Sotomayor summarized the activities of the committee over the last several months, which included the review of the litigation efforts of the past and present, and initial exploration of potential areas of emphasis. Member Sotomayor advised that a preliminary report would be provided at January meeting." And then at the January meeting, there's about a 50-page document summarizing 30 or more cases that the board had undertaken.

A number of them are pretty significant and very consistent with the kind of case that we had in the *Firefighters* case, where the board had filed litigation to really basically insist that you have perfect harmony between the applicants for a job and those who are selected for promotions.

Isn't that true that you were more active than you may have suggested to Senator Graham yesterday?

Judge SOTOMAYOR. No, because, as I said, I was—I started to describe the role of the board generally and we were not addressing the question of what I did or how I participated. That memo has to be examined in context. The memo was a moment in our 12-year history where the board was planning a retreat to think about what directions, if any, we should consider moving into or not. We were not reviewing the individual cases to see if the individual cases—what positions were taken, the type of strategies that we——

Senator SESSIONS. Didn't you know the cases that—that you—the position—the organization was—well my time was running out.

Chairman LEAHY. Your time has run out. I was wondering if you'd like to finish your answer.

Senator SESSIONS. I'll let you answer. But I'm just want to——

Judge SOTOMAYOR. The end of my answer was, the Fund had been involved in a series of areas, employment, public health, education, and others. And so the broader question for the Fund was, should we be considering some other areas of interest to the community? We held a retreat in which speakers from a variety of different civil rights organizations, academics, a number of people came and just talked to us. I don't actually remember there being a firm decision that followed that, but it was a part of a conversation, the sort of retreats that even my court has engaged in: what are we doing; what are we thinking about? But it wasn't a review of each individual case to judge its merits.

Senator SESSIONS. Thank you.

Chairman LEAHY. Judge, there's been a lot of talk about the *Maloney* case. I should note, it's not what you said. It's what Justice Scalia's opinion for the Supreme Court said in his decision, left in place the 123-year-old Supreme Court precedent on guns, did it not?

Judge SOTOMAYOR. Justice Scalia, in a footnote in the *Heller* decision, noted the court's holding that the Second Amendment wasn't incorporated against the States.

Chairman LEAHY. The only reason I mention that, I've been a gun owner since I was probably 13 years old. I've seen nothing done by the Supreme Court, by the Second Circuit Court of Appeals, by the Congress, or by our State legislature that is going to change, one way or the other, the ownership that I have of the guns I now have.

Senator Kohl.

Senator KOHL. Thank you very much, Senator Leahy.

Judge Sotomayor, you've told us that you will follow the law and follow precedent, and you've made a very big point of this and that is all well and good.

But some of the court's most important landmark hearings—landmark rulings overruled longstanding precedent, like *Brown* v. *Board of Education*, which ended legal segregation. Now, as an appellate judge, as we know, you're required to always follow precedent. But as a Supreme Court Justice, you will have the freedom to depart from precedent.

So tell us how you will decide when it is appropriate to alter, amend, or even overrule, precedent.

Judge SOTOMAYOR. The doctrine of stare decisis is a doctrine that looks to the value in the stability, consistency, predictability of precedent and it starts from the principles that precedent are important values to the society because it helps those goals. It also guides judges in recognizing that those who have become before them, the judges who have looked at these issues, have applied careful thought to the question and view things in a certain way, and a court should—a judge should exercise some humility and caution in disregarding the thoughts and conclusions of others who came—who came in that position before them.

But that's not to suggest that the doctrine says that precedence is immutable. And, in fact, I believe that England had an experiment with that question and—and it was not horribly successful. Precedents are precedents. They're not immutable, they have to change in certain circumstances. And those circumstances generally have been described by Justice Souter in the *Casey* case, are probably the best articulation people have come to in sort of talking about the factors that courts think about.

And it starts with, well, how much reliance has the society put into the precedent? What are the costs of changing it? I shouldn't say "start". He put them in a different order. There's no real importance to the order because all are factors that you put into the weighing as a judge looks at an existing precedent. It looks to whether the—whatever the court has said. Is it providing enough guidance to the court's below and to—and for people to determine what they can or can't do? Is the precedent administratively workable?

Number three—and as I said, there's no ordering to this—are the facts that the court assumed in its older precedents. Have those changed so that it would raise a question about the court revisiting a precedent? Also, has—are the—there are developments in related fields to precedents and approaches that are developed in those cases that may bring into question the foundation of an older precedent.

Brown v. *Board of Education* has often been described as a radical change by some, and the public perceives it as a radical change. When you actually look at its history, you realize there had been jurisprudence for over 20 years by the court striking down certain—certain schemes that provided "separate but equal", but in fact didn't achieve their stated goal.

And so there was underpinnings in *Brown* v. *Board of Education* that, in those precedents that came before Brown that obviously gave the court some cause, some reason to re-think this issue of "separate but equal". They also had before them the—probably one of the most famous dissents in American history, which was the dissent by Justice Harlan in Plessy.

And Justice Harlan so carefully laid out what the Constitution said, what the principles of the Constitution were that motivated the—the Congress to pass those amendments. He laid out the court's precedents in that area and he said, separate but equal is just not consistent with the Constitution.

Now, this isn't an opinion where he described another group of people as different, and so it wasn't that he was being motivated

by his personal views. He was being motivated by a view of the law that the court, in Brown, made a change about.

One final factor the court obviously looks at is the number of times a precedent has been reaffirmed by the court, but all of these things are decided on the basis of judgment of a particular case and the arguments that are raised before a judge, and recognizing as a judge that precedent is deserving of deference, precedent, and changing it should be done cautiously by a court, but precedent can't stand if other things counsel that it not.

Senator KOHL. Good.

Judge, I'd like to return to the topic of antitrust. Two years ago in the *Twombly* case, Justice Souter wrote an opinion that sharply departed from precedent when it held that a plaintiff must show extensive evidence to support an antitrust case before the opportunity for any discovery, otherwise the case would be dismissed. This decision makes it very difficult for any plaintiff to bring an antitrust action, particularly a consumer or small business without the resources to develop extensive economic evidence.

What is your assessment of this decision? Do you share the concern of many that this does serious damage to enforcement of antitrust law?

Judge SOTOMAYOR. As with all issues of statutory construction, my charge as a judge would be, how do I apply a court's holding in a particular case in the next situation before me? The concern that you express is one that I have heard about that expressed by some, but as a judge I don't make policy. I don't make the policy choices for Congress. I'm charged with looking at a particular situation that comes before me, looking at the court's precedent and applying it to that situation.

With respect to that case, I—I—that case, as I understand the case, had to do with how much had to be pled. I didn't understand it to mean that there had to be the presentation of evidence at the pleading stage, just what had to be pled to withstand a motion to dismiss in the case.

Senator KOHL. Well, my understanding of his decision is that, in the future, plaintiffs must show extensive evidence to support an antitrust case before the opportunity for any discovery or else the case will be dismissed. Now, assuming that's correct—and I'm not telling I'm positive, but assuming that's correct—does that cause you concern?

Judge SOTOMAYOR. As I said, the issue of concern is not how I look at the court's precedents, because what I'm doing in looking at the court's precedent is thinking about how it applies to another case. The question of how to do that and whether that's right by the court would be a question that Congress, who has passed the antitrust laws, would have to, in the first instance, think about changing.

Senator KOHL. So then are you saying in a case that would follow you would necessarily be bound by Justice Souter's decision in *Twombly*?

Judge SOTOMAYOR. The court considers its various precedents in the context of a new situation. In the cases decided by the courts, they're applied to the facts of the particular case. *Twombly* is con-

sidered, as are all the court's precedent in a new case, that examines the issue of what a complaint must allege or not allege.

Senator KOHL. So you would not be bound by the Twombly precedent, is that what you're saying?

Judge SOTOMAYOR. No. It's precedent.

Senator KOHL. So you would be bound?

Judge SOTOMAYOR. It must be applied, as is all the court's existing precedents that have not been rejected by the court. It has to be considered and has to be weighed in the situation presented.

Senator KOHL. All right. I think maybe we can talk about that subsequently to understand your meaning and what I'm saying, my reading of *Twombly* versus your reading of *Twombly*, as it will affect future antitrust cases. My understanding is that it will have a very negative effect on—a negative impact on the average person or small business' ability to bring an antitrust case that might otherwise have merit, because of the requirement that they present enormous amounts of evidence even before they can go to discovery or the case is dismissed.

Now, if I'm speaking accurately, then I think that that's a precedent that needs to be thought about very carefully, and that's why I asked the question.

Judge SOTOMAYOR. And Senator, the one thing I do know as a judge is that every argument gets made to the courts not on one occasion, but many. The question that will arise is: what's the extent of the court's application in the next case?

Senator KOHL. All right. Finally, Judge, the Supreme Court not only has the power, as you know, to decide cases and to construe the Constitution, but it also has the sole and absolute power to decide which cases it hears. If you are confirmed, only you and three other Justices can decide whether a case will be heard to begin with by the Supreme Court. In recent times, the Supreme Court has received appeals in nearly 7,000 cases each year and it only hears about 70 or 80 cases, as you know. In other words, the Justices choose to hear only about 1 percent of the appeals that they receive. This is obviously a very, very crucial power that Justices have.

Now, I recognize that one of the criteria for choosing cases is to resolve disagreement among the Circuit Courts about a particular aspect of the law, but many of the most important and prominent cases in the history of the Supreme Court did not involve splits into Circuit Courts, but were instead cases of national importance.

So how will you determine which cases are so important as to warrant review by the Supreme Court? In other words, which 1 percent of those appeals will you consider?

Judge SOTOMAYOR. What I know, and you did accurately describe one aspect of the Supreme Court's local rules that suggest just that Justices will consider a variety of factors in whether to grant cert or not, and one of those listed factors is disagreement among the Circuits, disagreements among the Circuits and Circuits and State courts and issues that have not been adequately addressed but require being addressed for a variety of different reasons.

It is very difficult to talk in the abstract about when cert should be granted because each situation presents a different set of facts and each question about whether a case is in the right posture to

look at an issue—as I said yesterday, sometimes there—yesterday I said—I may have explained earlier in a response to Senator Specter, and I know that you had stepped away, there are procedural—there are cases that present other arguments than the one that the Circuit split exists on, and those other arguments might dispose of the case in the way the Circuit Court did and not necessitate the reaching of an issue.

There's a question, at least as some Justices have defined it, of whether there's been enough percolation among the Circuit Courts so that all of the views of a particular issue have been fully explored. The circumstances and the issues that each Justice uses depends on the facts and the posture of what comes before it. I would obviously consider the court's local rules. I would give consideration to the point that some have raised, that the court is not doing enough.

But that can't counsel taking cases. That could only be—look at my—look at the workload and see, can the case—can the court do this if it meets all the other criteria that goes into the mixture of whether to grant cert or not? You don't, like Congress, think about policy, we're going to decide 150 cases this year. You look at the cases that come before you and you figure out which ones are in a place to be reviewed.

Senator KOHL. Thank you.

Chairman LEAHY. Thank you very much.

Senator Hatch, we'll turn to you and then we will—and then we will take a break after you're finished.

[Recess at 4:55 p.m. to 5:08 p.m.]

Chairman LEAHY. Welcome back, Judge. We will skip over one and go to Senator Feingold. You are recognized for up to 20 minutes. I keep adding the "up to" hoping somebody will follow my example.

Senator FEINGOLD. Well, I——

Chairman LEAHY. But I do mean nobody will be cut off before 20 minutes.

Senator FEINGOLD. Thank you, Mr. Chairman. I understand, and I'd like to begin using my time by asking that a letter from former members of PRLDEF's Board describing the role of board members, which does not include choosing or controlling litigation—I'd ask unanimous consent.

Chairman LEAHY. Without objection it will be part of the record.

[The letter appear as a submission for the record.]

Senator FEINGOLD. Thank you, Mr. Chairman.

Judge, again, thanks for your tremendous patience. I'd like to start by talking for a moment about the recent Supreme Court decision in *Caperton* v. *Massey*. I consider this a significant case that bears upon the flood of special interest money that threatens to undermine public confidence in our justice system. The facts of this case are notorious: John Grisham used them as an inspiration for his novel, *The Appeal*.

A jury in West Virginia returned a $50 million verdict for a large coal company, and pending the appeal, the company's CEO spent $3 million to elect an attorney named Brent Benjamin to the state supreme court. That was a huge amount of money, relatively speaking—more than the amount spent by all of Benjamin's other

financial supporters combined. Benjamin won the election, became a West Virginia Supreme Court Justice, and lo and behold, he voted to overturn that $50 million verdict against his main campaign contributor. Twice, he refused to recuse himself in the case, despite his obvious conflict of interest.

Last month, the Supreme Court held that Benjamin's failure to recuse himself was intolerable under our Constitution's guarantee of due process of law. The court also noted approvingly that most states have adopted codes of judicial conduct that prevent this kind of conflict, and to that end, I commend the Wisconsin Supreme Court's plan to revise its recusal rules to provide additional safeguards that protect judicial impartiality.

You've been a judge for many years and you may have seen examples when you thought a judge should have withdrawn, although hopefully none were as egregious as this case. In your opinion, what additional steps should judges and legislators take to ensure that the judiciary is held to the highest ethical standards and that litigants can be confident that their cases will be handled impartially?

Judge SOTOMAYOR. Senator, I would find it inappropriate to make suggestions to Congress about what standards it should hold judges to or litigants to. That's a policy choice that Congress will consider.

I note that the American Bar Association has a Code of Conduct that applies to litigants. The Judicial Code has a Code of Conduct for judges. And as you noted in—in the State system where judges are elected, many States are doing what I just spoke about, making and passing regulations.

Caperton was a case that was taken under the local rules of the Supreme Court, presumably, that exercises supervisory powers over the functioning of the courts and it presented, obviously, a significant issue because the court took it and decided the case.

At issue fundamentally is that judges, lawyers, all professionals must, on their own, abide by the highest standards of conduct. And I have given a speech on this topic to students at Yale at one point where I said the law is only the minimum one must do. Personally, one must act in a way in cases to ensure that you're acting consistent with your sense of meeting the highest standards of the profession.

Senator FEINGOLD. Thank you, Judge.

As I'm sure you know, on the last day of the term, the Supreme Court ordered that a pending case involving federal election law called *Citizens United* v. *FEC* be re-argued in September. It's quite possible that you will be a member of the court by then. I do not intend to ask you how you would rule in that case, but I do want to express my very deep concern about where the Supreme Court may be heading, and then pose a general question to you.

In 2003, the court, in a 5–4 ruling, upheld the McCain-Feingold bill against constitutional challenge. I believe that ruling accurately applied the court's previous precedents and recognized that Congress must have the power to regulate campaign finance to address serious problems of corruption and the appearance of corruption.

Since the arrival on the court of its two newest members, the court seems to have started in another direction on these issues, striking down or significantly narrowing two provisions of the law: the Millionaire's Amendment in the *Davis* case and the issue ad provision in *Wisconsin Right to Life*. Several Justices have even argued that corporations and living persons should have the same constitutional rights to support their chosen candidates and that *Austin* v. *Michigan Chamber of Commerce*, a case rejecting that idea, should be overruled.

Austin is premised on what I believe is an absolutely reasonable conclusion that the political activities of corporations may be subjected to greater regulation because of the legal advantages given to them by the states that allow them to amass great wealth. In scheduling re-argument in the *Citizens United* case, the court specifically asked the parties to address whether *Austin* should be overruled. If the court does that, and depending on how exactly it rules, Judge, it may usher in an era of unlimited corporate spending on elections that the nation has not seen since the 19th century.

Without addressing the specifics of the *Citizens United* case, I'd like to ask you what the Constitution and the Supreme Court's precedents generally provide about the rights of corporations, and what the current state of the law is as far as corporate participation in elections, as you understand it.

Judge SOTOMAYOR. Senator, I have attempted to answer every question that's been posed to me. You have noted that Citizens United is on the court's docket for September. I think it's September 9th. If I were confirmed for the—to the court, it would be the first case that I would participate in.

Given that existence of that case, the very first one, I think it would be inappropriate for me to do anything to speak about that area of the law because it would suggest that I'm going into that process with some prejudgment about what precedent says and what it doesn't say, and how to apply it in the open question the court is considering. I appreciate what you have said to me, but this is a special circumstance given the pendency of that particular case.

Senator FEINGOLD. And frankly, Judge, I probably would say the same thing if I were in your shoes, given——

[Laughter.]

Senator FEINGOLD.—given the facts as they are. I appreciate the opportunity to express what I wanted to say about that.

And with that, Mr. Chairman, I'm going to use up less than half of my time.

Chairman LEAHY. All right. Thank you. I think you've set a fantastic example.

[Laughter.]

Chairman LEAHY. I commend you. I say that in a totally nonpartisan fashion.

Senator Grassley.

Senator GRASSLEY. I assume that I get the time that he didn't use?

Chairman LEAHY. No.

[Laughter.]

Chairman LEAHY. No. After your demonstrator, was it yesterday—your demonstrator, that you tend to turn people on, we don't need any more.

[Laughter.]

Senator GRASSLEY. Okay.

Chairman LEAHY. We don't need any more excitement, Senator Grassley.

Senator GRASSLEY. Yeah.

Chairman LEAHY. We want it as low-key as possible. But you—you do have up to 20 minutes. The opportunity is up to 20 minutes.

Senator GRASSLEY. Now, I believe that I'm going to ask you something you've never been asked before during this hearing, I hope. I'd like to be original on something.

I want to say to you that there's a Supreme Court decision called *Baker* v. *Nelson*, 1972. It says that the Federal courts lack jurisdiction to hear due process and equal protection challenges to State marriage laws "for want of substantial Federal question", which obviously is an issue the courts deal with quite regularly, I mean, the issue of is it a Federal question or not a Federal question.

So do you agree that marriage is a question reserved for the States to decide based on *Baker* v. *Nelson*?

Judge SOTOMAYOR. That also——

Senator GRASSLEY. I thought I'd ask a very easy——

Judge SOTOMAYOR.—is a question that's pending and impending in many courts. As you know, the issue of marriage and what constitutes it is a subject of much public discussion, and there's a number of cases in State courts addressing the issue of what—who regulates it, under what terms.

Senator GRASSLEY. Can I please interrupt you?

Judge SOTOMAYOR. Uh-huh.

Senator GRASSLEY. I thought I was asking a very simple question based upon a precedent that *Baker* v. *Nelson* is, based on the proposition that yesterday, in so many cases, whether it was Griswold, whether it was *Roe* v. *Wade*, whether it was Chevron, whether it's a whole bunch of other cases that you made reference to, the *Casey* case, the *Gonzalez* case, the *Leegan Creative Leather Products* case, the *Kelo* case. You made that case to me. You said these are precedents. Now, are you saying to me that *Baker* v. *Nelson* is not a precedent?

Judge SOTOMAYOR. No, sir. I just haven't reviewed Baker in a while, and so I actually don't know what the status is. If it is the court's precedent, as I've indicated in all of my answers, I will apply that precedent to the facts of any new situation that implicates it.

Senator GRASSLEY. Well——

Judge SOTOMAYOR. Always the first question for a judge.

Senator GRASSLEY. Well, then tell me—tell me what sort of a process you might go through if a case, a marriage case, came to the Supreme Court of whether *Baker* v. *Nelson* is precedent or not, because I assume if it is precedent, based on everything you told us yesterday, you're going to follow it.

Judge SOTOMAYOR. The question on a marriage issue will be, two sides will come in. One will say Baker applies, another will say this court's precedent applies to this factual situation, whatever the fac-

tual situation is before the court. They'll argue about what the meaning of that precedent is, how it applies to the regulation that's at issue, and then the court will look at whatever it is that the State has done, what law it has passed on this issue of marriage, and decide, Okay, which precedent controls this outcome? It's not that I'm attempting not to answer your question, Senator Grassley. I'm trying to explain the process that would be used Again, this question of how, and what is constitutional or not, or how a court will approach a case and what precedent to apply to it, is going to depend on what's at issue before the court. Could the State do what it did?

Senator GRASSLEY. Can I interrupt you again? Following what you said yesterday, that certain things are precedent, I assume that you've answered a lot of questions before this Committee about—even after you said that certain things are precedent, of things that are going to come before the court down the road when—if you're on the Supreme Court. You didn't seem to compromise or hedge on those things being precedent. Why are you hedging on this?

Judge SOTOMAYOR. I'm not on this because the holding of *Baker* v. *Nelson* is it's holding. As a holding, it would control any similar issue that came up. It's been a while since I've looked at that case so I can't——

Senator GRASSLEY. Okay

Judge SOTOMAYOR.—as I could with some of the more recent precedent of the court or the more core holdings of the court on a variety of different issues, answer exactly what the holding was and what the situation that it applied to. I would be happy, Senator, as a follow-up to a written letter, or to give me the opportunity to come back tomorrow and just address that issue. I'd have to look at Baker again.

Senator GRASSLEY. I would appreciate it.

Judge SOTOMAYOR. It's been too long since I've looked at it.

Senator GRASSLEY. Yeah. You——

Judge SOTOMAYOR. So it may have been, sir, as far back as law school, which was 30 years ago.

Senator GRASSLEY. Oh, were you probably in grade school, you were at that time.

Judge SOTOMAYOR. Yeah. It was—I know that I looked at it, sir.

Senator GRASSLEY. Okay. Okay.

I want to go on, but I would like to have you do that, what you'd suggested you'd answer me further after you've studied it.

I have a question that kind of relates to the first question. In 1996, Congress passed, and President Clinton signed into law, the Defense of Marriage Act which defined marriage for the purpose of Federal law as between one man and one woman. It also prevents a State or territory from giving effect to another State that recognizes same-sex marriages. Both provisions have been challenged as unconstitutional and Federal courts have upheld both cases, one is the *Wilson* case, one is the *Bishops* case, in District Court.

Do you agree with Federal courts which have held that the Defense of Marriage Act does not violate the full faith and credit clause and is an appropriate exercise of Congress' power to regulate conflicts between laws in different States?

Judge SOTOMAYOR. That's very similar to the Austin situation, but the ABA rules would not permit me to comment on the merits of a case that's pending or impending before the Supreme Court. The Supreme Court has not addressed the constitutionality of that statute, and to the extent that lower courts have addressed it and made holdings, it is an impending case that could come before the Supreme Court. So, I can't comment on the merits of that case.

Senator GRASSLEY. Okay. Have you ever made any rulings on the full faith and credit clause?

Judge SOTOMAYOR. I may have. But if your specific question is, have I done it with respect to a marriage-related issue——

Senator GRASSLEY. Well, I'm not——

Judge SOTOMAYOR. No.

Senator GRASSLEY. On any—on anything in the full faith and credit clause.

Judge SOTOMAYOR. I actually have no memory of doing so.

Senator GRASSLEY. Okay. That's Okay. No, you can stop there. That's Okay.

Now, I'm going to go to a place where Senator Hatch left off, but I'm not going to repeat any of the questions that he asked. But there's one that I want to ask, and I feel a little bit guilty on this. My dad used to have a saying to us kids when we were harping on something. He says, "When are you going to quit beating a dead horse?" But I want to ask you anyway. You—you also wrote, "I wonder whether achieving that goal is possible in all, or even in most, cases, and I wonder whether, by ignoring our differences as women and men of color, we do a disservice both to the law and to society."

So the concern I have about the statement is it's indicating that you believe judges should, and must, take into account gender, ethnic background, or other personal preferences in their decision making process. Is that what you meant? And I want to follow it up so I don't have to ask two questions: how is being impartial a disservice to the law and society? Isn't justice supposed to be blind?

Judge SOTOMAYOR. No, I do not believe that judges should use their personal feelings, beliefs, or value systems or make their—to influence their outcomes, and neither do I believe that they should consider the gender, race, or ethnicity of any group that's before them. I absolutely do not believe that.

With respect to, yes, is the—is the goal of justice to be impartial, that is the central role of a judge. It—the judge is the impartial decision maker between parties who come before them. My speech was on something else, but I have no quarrel with the basic principles that you have asked me to recognize.

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. Now, no quarrel sounds equivocal. They—I do believe in those things absolutely, and that's what I have proven I do as a judge.

Senator GRASSLEY. Okay.

Then the last one on this point of another remark you made. You also stated that you "further accept that our experiences as women and people of color affect our decisions". And then, further, "that personal experiences affect the facts that judges choose to see," and

that, further, "there will be some (differences in my judging) based on my gender and Latina heritage."

Do you believe that it is ever appropriate for judges to allow their own identity/politics to influence their judging?

Judge SOTOMAYOR. No, sir. Absolutely not.

Senator GRASSLEY. Okay.

Then I want to move on to another area. This question comes from your 1992 Senate questionnaire. You wrote in response to a question about judicial activism that "intrusions by a judge upon the functions of other branches of government should only be done as a last resort and limitedly". Is this still your position? And let me follow up: when would such an intrusion be justified? For example, what is an example of last resort? What is an example of limited—"limitedly"?

Judge SOTOMAYOR. The answer is, judges and—and the manner in which that question was responded to was, to the extent that there has been a violation of the Constitution in whatever manner of court identifies in a particular case, it has to try to remedy that situation in the most narrow way in order not to intrude on the functions of other branches or actors in the process.

The case that I—was discussed in my history has been the *Doe* case, in which I joined the panel decision where the District Court had invalidated a statute that found unconstitutional a statute that the legislator—legislature had passed on national security letters. Our panel reviewed that situation and attempted to discern, and did discern, Congress' intent to be that despite a—isolation provisions that might have to be narrowly construed to survive constitutional review, it held that the other provisions of the Act were constitutional.

So the vast majority, contrary to what the District Court did—and I'm not suggesting it was intending to violate what I'm describing, but the court took a different view than the Circuit did—we upheld the statute in large measure. To the extent that we thought there were, and found that there were two provisions that were unconstitutional, we narrowly construed them in order to assist in effecting Congress' intent. That's what I talked about "limitedly" in that answer.

Senator GRASSLEY. Okay.

A little bit along the same line, in your Law Review articles you wrote that, "Our society would be straitjacketed were not the courts, with the able assistance of the lawyers, constantly overhauling"—and I don't know whether that's your emphasis or mine, but I've got it underlined—"the law and adapt"—maybe I'd better start over again.

"Our society would be straitjacketed were it not—were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political changes."

The explanation of the statement from you. I think you're saying that judges can twist the law regardless of what the legislature, the elected branch of government, has enacted into law. It's kind of my interpretation of that. Obviously I think you're going to tell me you don't mean that, but at least you know where I'm coming from.

Judge SOTOMAYOR. No. That interpretation was clearly not my intent, and if—I don't actually remember those particular words, but I do remember the speech. I'm assuming you're talking about returning majesty to the law. And there I was talking about a broader set of questions, which was how to bring the public's respect back to the function of judges.

And I was talking about—that judges—that lawyers have an obligation to explain to the public the reasons why what seems unpredictable in the law has reasons, and I mentioned in that speech that one of the big reasons is that Congress makes new laws. That was the very first reason I discussed. And also that there's new technology, there's new developments in society, and what lawyers do is come in and talk to you about, okay, we've got these laws, how do you apply them to this new situation?

And what judges do—and that's why I was talking about the assistance of judges of lawyers—is what you do, is you look at the court's precedent, you look at what a statute says and you try to understand the principles that are at issue and apply them to what the society is doing, and that was the focus of my speech, which was, talk to the public about the process. Don't feed into their cynicism that judges are activists, that judges are making law. Work at explaining to the—to the public what the process is. I also talk to—part of my speech is what judges can do to help improve respect of the public in the legal process.

Senator GRASSLEY. So the use of the word "overhaul" does not in any way—"overhaul the law"——

Judge SOTOMAYOR. Right.

Senator GRASSLEY.—does not in any way imply usurpation of legislative power by the courts?

Judge SOTOMAYOR. No. And if you look at what I was talking about, it was, the society develops.

Senator GRASSLEY. Yeah.

Judge SOTOMAYOR. We are not, today, what we were 100 years ago in terms of technology, medicine, so many different areas. There are new situations that arise and new facts that courts look at. You apply the law to those situations, but that is the process of judging which is sort of trying to figure out, what does the law say about a set of facts that may not have been imagined at the time of the founding of the Constitution, but it's what the judge is facing then: how do you apply it to that?

Senator GRASSLEY. Yeah.

I want to go back to *Didden* based upon my opportunity to reflect on some things you said yesterday. The time limit to file a case in *Didden* was 3 years. Mr. Didden was approached for what he classified as extortion in November 2003. Two months later, in January of 2004, he filed his lawsuit. But under your ruling, Mr. Didden was required to file his lawsuit in July 2002, close to a year and a half before he was actually extorted. So that doesn't make sense to require someone to file a lawsuit on a perceived chance that an order might occur.

You also testified that the Supreme Court's *Kelo* decision was not relevant to the *Didden* holding, but your opinion, in cursory fashion, which is a problem that we addressed yesterday, states that

if there was no Statute of Limitations issue, *Kelo* would have permitted Mr. Didden's property to be taken.

It's hard to believe that an individual's property can be seized when he refuses to be extorted without any constitutional violation taking place. It's even harder to believe that, under these circumstances, Mr. Didden—Mr. Didden did not deserve his day in court or at least some additional legal analysis.

Could you please explain how Mr. Didden could have filed his lawsuit July 2002 before he was extorted in November 2003? And also please explain why a July 2002 filing would not have been dismissed because there was no proof that Mr. Didden had suffered an injury, only an allegation that he might be injured in the future.

Judge SOTOMAYOR. The basis of Mr. Didden's lawsuit was, the State can't take my property and give it to a private developer, and—because that is not consistent with the Takings Clause of the Constitution.

To the extent he knew the State—and there's no dispute about this—that the State had found a public use for his property, that it had a public purpose, that it had an agreement with a private developer to let that developer take the property, he knew that he was injured because his basic argument was, the State can't do this. It can't take my property and give it to a private developer.

The Supreme Court, in *Kelo*, addressed that question and said under certain circumstances the State can do that if it's for a public use and a public purpose. And so his lawsuit essentially addressing that question came 5 years after he knew what the State was doing. The issue of extortion was a question of whether the private developer, in setting a lawsuit with them, was engaging in extortion, and extortion is an unlawful asking of money with no basis. But the private developer had a basis. He had an agreement with the State. And so that is a different issue than the timeliness of Mr. Didden's complaint.

Chairman LEAHY. Thank you.

Chairman LEAHY. Senator Cardin? We'll recognize Senator Cardin. And then for those who have to plan, we will then recess until 9:30 tomorrow morning.

Senator Cardin.

Senator CARDIN. Well, Judge, let me first say that since this will be my last time in this hearing to address you, to say this has been my first confirmation hearing for a—Supreme Court Justice. You have set a very high standard for me and for those I might have to consider, because there's always a possibility of future vacancies on the Supreme Court. As for responding to our questions, being very open with us, and I think really demonstrating the type of respect for the process that has really shown dignity to you and to our committee, I thank you for that.

I thanked you in the beginning for your willingness to serve the public as a prosecutor and as a judge, and now willing to take on this really incredible responsibility. I just really want to emphasize that again. I don't know if you thought when you were being considered for this what you would have to go through as far as the appearance before the Judiciary Committee, but it gets better after our hearings, I believe.

So let me ask you one or two questions, if I might. I want to follow up on Senator Kohl's question on the selection of cases under certiorari. As has been pointed out earlier, maybe 1 percent of the cases that are petitioned to the Supreme Court actually recieve an opinion.

Now, Senator Kohl asked you what standards you would use in choosing cases and one factor I believe is important to look at is the impact that a Supreme Court case can have on society. I'm going to refer to one of your cases, the *Boykin* case, which was the housing case where you allowed that borrower to go forward, African-American, on a discrimination issue. And we've seen throughout history discrimination against minorities in housing, with redlining and predatory lending. It led to the Fair Housing Act enacted by Congress.

The Supreme Court has long recognized Title 7 and 8 of the Federal Housing Act as part of the coordinated scheme of the Federal civil rights laws enacted to end discrimination. But there are still major challenges that are out there. Predatory lending still takes place. It's happened during this housing crisis with the subprime mortgage market targeted toward minority communities.

I say that in relationship to the *Boykin* case, which I agreed with your conclusion that it not only could affect the litigants that were before you, but could have an impact on industry practice if, in fact, there was discrimination and the case was decided by your court.

And the same thing is true in the Supreme Court, more so in the Supreme Court. It is the highest judgment of our land. And yes, you have to be mindful when you take a case on cert as to the impact it will have on the litigants. Certainly you have to take into consideration if there's been different, inconsistent rulings in the different Circuits.

But it seems to me that one of the standards I would hope you would use in choosing cases is the importance of deciding that particular case for the impact it can have on a broader group of people in our Nation, whether it's a housing case that could affect communities' ability to get fair access to mortgages for home ownership, or whether it's a case that could have an impact on a class of people, on environmental or economic issues. And I just would like to ask you whether this, in fact, is a reasonable request as you consider certiorari requests, that one of the factors that is considered is the impact it has on the community at large.

Judge SOTOMAYOR. As I indicated earlier, we don't make policy choices. That means that I would think it inappropriate for a court to choose a case because—or a court—a judge to choose a case based on some sense of, I want this result on society. A judge takes a case to decide a legal issue, understanding its importance to an area of law and to arguments that parties are making about why it's important.

The question of—of impact is different than what a judge looks at, which is what's the state of the law and this question, and how—and what clarity is needed, and other factors. But as I said, there's a subtle but important difference in separating out and making choices based on policy and how you would like an issue

to come out than a question that a judge looks at in terms of assessing the time at which a legal argument should be addressed.

Senator CARDIN. And I respect that difference and I don't want you to be taking a case to try to make policy. But I do think the—need for clarity for the community as to what is appropriate conduct well beyond the litigants of a particular case is a factor where clarification is needed and should weigh heavily on whether the court takes that type of case or not.

Judge SOTOMAYOR. There's just no one factor that controls the choice where you say, I'm going to look at every case this way. As I said, judges in—in—well, I shouldn't talk because I haven't—I'm not there.

Senator CARDIN. All right.

Judge SOTOMAYOR. But my understanding of the process is that it's not based on those policy implications of an outcome.

Senator CARDIN. Uh-huh.

Judge SOTOMAYOR. It's based on a different question than that.

Senator CARDIN. Well, let me conclude on one other case that you ruled on where I also agree with your decision, and that's in *Ford* v. *McGinnis*, where you wrote a unanimous panel opinion overturning a District Court summary judgment, finding in favor of the Muslim inmate who was denied, by prison officials, access to his religious meals marking the end of Ramadan. You held that the inmate's fundamental rights were violated and that the opinions of the Department of Corrections and religious authorities cannot trump the plaintiff's sincere and religious beliefs.

Religious Freedom is one of the basic principles in our Constitution. As I said in my opening comments, it was one of the reasons my grandparents came to America. The freedom of religion expression is truly a fundamental American right. Please share with us your philosophy as to—maybe that's the wrong use of terms, but the importance of that provision in that Constitution and how you would go about dealing with cases that could affect this fundamental right in our Constitution.

Judge SOTOMAYOR. I—I don't mean to be funny, but the court has held that it's fundamental in the sense of incorporation against the States.

[Laughter.]

Judge SOTOMAYOR. But it is a very important and central part of our democratic society that we do give freedom of religion, of practice of religion, that the Constitution restricts the—the State from establishing a religion, and that we have freedom of expression and speech as well.

Those freedoms are central to our Constitution. The four cases, others that I have rendered in this area, recognize the importance of that in terms of one's consideration of actions that are being taken to restrict it in a particular circumstance. Speaking further is difficult to do, again, because of the role of a judge. To say it's important, that it's fundamental, that it's legal in common meaning, is always looked at in the context of a particular case. What's the State doing?

In the *Ford* case that you just mentioned, the question there before the court was, did the District Court err in considering whether or not the religious belief that this prisoner had was consistent

with the established traditional interpretation of a meal at issue? Okay.

And what I was doing was applying very important Supreme Court precedent that said it's the subjective belief of the individual. Is it really motivated by a religious belief? That's one of the reasons we recognize conscientious objectors, because we're asking a court not to look at whether this is orthodox or not, but to look at the sincerity of the individual's religious belief and then look at what the State is doing in light of that. So that was what the issue was in Ford.

Senator CARDIN. Well, thank you for that answer. Again, thank you very much for the manner in which you have responded to our questions.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Thank you very much, Senator Cardin.

As I noted earlier, we will now recess until 9:30 tomorrow morning. I wish you all a pleasant evening. Thank you.

[Whereupon, at 5:50 p.m. the Committee was recessed.]

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